IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

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AGROFRESH INC.,	:	CIVIL ACTION
Plaintiff,	:	
vs.	:	
ESSENTIV LLC, DECCO U.S. POST-HARVEST, INC., CEREXAGRI INC., d/b/a DECCO POST-HARVEST, and UPL, LTD.,	:	
Defendants.	:	NO. 16-662-MN

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Wilmington, Delaware
Thursday, September 5, 2019
9:33 o'clock, a.m.

- - -

BEFORE: HONORABLE MARYELLEN NOREIKA, U.S.D.C.J.

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APPEARANCES:

BARNES & THORNBURG LLP
BY: CHAD S.C. STOVER, ESQ.

-and-

Valerie J. Gunning
Official Court Reporter

APPEARANCES (Continued):

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Counsel for Plaintiff

RICHARD, LAYTON & FINGER
BY: FREDERICK L. COTTRELL, III, ESQ.

-and-

FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP
BY: GERALD F. IVEY, ESQ.
JOHN WILLIAMSON, ESQ.,
RAJ GUPTA, ESQ. and.
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(Washington, D.C.)

Counsel for Defendants

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P R O C E E D I N G S

(Proceedings commenced in the courtroom, beginning at 9:33 a.m.)

THE COURT: Good morning.

(Counsel respond, "Good morning, Your Honor.")

THE COURT: Please be seated. Let's start with some introductions.

MR. STOVER: Good morning, Your Honor. Chad Stover from Barnes & Thornburg.

With me today are Robert MacGill, Matthew Ciulla and Jessica Lindemann, all from Barnes & Thornburg in Indianapolis.

THE COURT: Good morning and welcome.

Mr. Cottrell?

MR. COTTRELL: Thank you, Your Honor. Good morning. Fred Cottrell from Richards, Layton & Finger for the defendants.

With me first from Finnegan Henderson, Gerald Ivey, John Williamson, and Raj Gupta. Also from Finnegan, Anand Sharma, and our clients are here from UPL. Rumit Kumar, who is the Global General Counsel, and Carlos Pellicer, who is the Global COO of Strategy for UPL.

THE COURT: Good morning, and welcome to

Delaware.

MR. COTTRELL: Thank you.

THE COURT: So we've reviewed the omnibus summary judgment motion from defendants as well as the Daubert motion that defendants filed, and I wanted to hear a little bit more from you on some of the issues. We had a few questions. And then I also want to talk a little bit about the trade secret disclosures at the end.

So if you don't mind -- Mr. Ivey, if you don't mind, I would like to take it starting with the Daubert motion first, and I would like to hear from the plaintiff first on this one even though it's defendants' motion. I am inclined at the moment to grant the motion and exclude Mr. Kleinrichert's testimony, but I want to hear from the plaintiff first. Mr. Ivey?

MR. IVEY: Yes. Our motion. Good morning, Your Honor. Gerald Ivey. The issue on behalf of Finnegan, UPL and Decco will be addressed by John Williamson with the Court's permission.

THE COURT: Of course.

MR. IVEY: Thank you.

THE COURT: But first, plaintiff.

MR. STOVER: And, Your Honor, with your permission, Mr. MacGill will handle that. I also neglected to introduce Mr. Thomas Ermi and Mina Thomas, who are

in-house counsel for AgroFresh.

THE COURT: Welcome to you as well.

MR. STOVER: Thank you.

THE COURT: Anyone who wants to argue, just make sure you introduce yourself for the first time and that's fine.

So I had a couple of questions on this motion, and what I really didn't understand from the response is, what is it that you are proposing happen at the trial? So it just seemed like all Mr. Kleinrichert did is add some numbers up, and that then there's this kind of big hole where I hear there will be other evidence and testimony that I don't quite understand what it is that's going to pull all of this together and come up with a number. And so I'm trying to understand what it is that is actually going to happen with some specifics as opposed to kind of more generality.

MR. MacGILL: Thank you, Your Honor, and good morning once again. I'm Rob MacGill, representing your plaintiff in this case, AgroFresh.

And maybe to start with, the data that we have that we're presenting to the Court in terms of these costs of development. And if we looked at some slides -- and if I may have those binders, please.

And if we look at the beginning of this, Your

Honor, in terms of getting an orientation to the factual evidence that we have that we would be presenting to the Court, we can start with the details associated with what Mr. Kleinrichert will testify to.

If we go to slide 3 of the case overview, you see from materials that have been presented to Your Honor, this is the table that Mr. Kleinrichert and FTI have used to amalgamate and summarize the costs of development for a 14-year period of time, and they use data, specific data that came from Dow, which was the legacy. We acquired this company from Dow in a transaction some years ago.

Now, where is the data and where does that come from? In answer to the Court's question, the data comes from Dow, and there's a witness who testified, Mr. Chandramouli. And Mr. Chandramouli identified in his deposition in January of this year the Excel spreadsheets, which are the data that make up these costs of development.

So these are -- and the Court would, as you would anticipate, voluminous materials over a period of time and they fall into two categories. They fall into categories as we reference.

And if we could go to --

THE COURT: No. I understand. They fall into development of the 1-MP stuff in general and then the product specifically. Right?

MR. MacGILL: They do.

THE COURT: Okay. So I got that and I read all of your papers. What I don't understand though is what is going to happen? He can't testify that any of these costs have anything to do with a particular trade secret or even the trade secrets altogether, and all I understood from your papers is, oh, but someone else somehow else is going to do that.

Are you planning to come up with a number to give the jury for unjust enrichment? And if so, who is going to do that and what's the number going to be and where has it been disclosed?

So I have this feeling that if I say go ahead, we're just going to have a free-for-all at trial and there is going to be some number for the first time the defendants are seeing at trial, and that doesn't seem right to me. So I'm trying to understand, what are you proposing to do with this at trial? And give me specifics, not somebody somewhere is going to say something to tie it all together, believe me.

MR. MacGILL: Okay. So Mr. Kleinrichert will testify on three distinct assumptions.

Number one, he will testify to material evidence and testimony that at the trial, in front of -- in your presence and in front of the jury. Your Honor, we will

establish that these costs are limited, or at least narrowly limited to costs that were relative to developing the costs, I should say, they relate to the trade secrets at issue in this case.

So with respect to that first assumption, that will come from a variety of witnesses. Dr. Beaulieu, who is our current head of research, will confirm that.
Mr. Cassidy, who has financial orientation and detail, will testify to that.

THE COURT: So they're going to go through specifically and say each of these things, for example, the rental car costs with respect to selling another product that the defendant pointed out? Someone is going to go through, and for every cost that Mr. -- how do you say his name?

MR. MacGILL: Kleinrichert Richard.

THE COURT: Kleinrichert included, someone is going to say, yes, that relates to something here?

MR. MacGILL: It will.

THE COURT: And what I'm trying to figure out, you're going to have two people saying these costs to be included relate to a trade secret issue?

MR. MacGILL: Yes. And this will come --

THE COURT: You know you only get five days for this trial?

MR. MacGILL: We do. We understand that. We understand this is a timed trial and there are limitations that we need to deal with and be prepared to meet.

But, Your Honor, with respect to the specific testimony we will offer on this point. Dr. Beaulieu, you can go to what we filed with you and the Court last week and you can see the listing of the trade secrets that are at issue here, and you'll see with respect to that listing, he will testify that each and every one of those trade secrets were developed over a 20-year period of time. They were informed by thousands of studies. Okay. Those thousands of studies that were done over a 14-year period of time are included in the summary here.

Dr. Beaulieu and Mr. Cassidy will confirm what was done to present and prepare these studies. To be more specific, what will Mr. Cassidy share in terms of details about the costs that are included in these Excel spreadsheets and during the period of time of his involvement?

He will show, for example, through his trial testimony, Your Honor, he will testify specifically, he will be able to describe that for a period of years, he will be able to describe the number of studies done, the costs associated with those particular studies. He will show, for example, in a 2010 to 2014 or '15 period of time, during his

tenure, his involvements in his accounting and his financial recordkeeping, he will be able to establish, for example, with respect to different tests that were done, how many hours were spent by how many people. He will be able to show you specifically how many hours were spent on this study, how many items of fruit were actually tested in connection with this specifically. And he'll be able to provide to you examples.

And if we could take a look at a couple of other references here, he will be able to describe specifically by particular study and particular year, he'll be able to show what the specifics were in terms of number of fruits that were tested. Examples that he'll give will include during his tenure and specifically what he did.

THE COURT: But how is this within -- why can't he just testify about the costs of these? What is it that you need Mr. Kleinrichert for?

MR. MacGILL: We need Mr. Kleinrichert to do what Courts, what the Third Circuit has authorized we think repeatedly what's helpful to the jury to amalgamate these costs into discernible elements. Okay.

THE COURT: But they have to be discernible elements that are relevant to the particular issues in the case. Right?

MR. MacGILL: Yes, of course, they do.

THE COURT: So who is going to go through and say what is the relevance of, for example, the rental car costs associated with selling? Who is going to go through and tell me that so that when you put this big number in front of the jury, I know that that number had something to do with the issues in this case?

I completely understand what you are telling me about these other folks, that Dr. Beaulieu is going to say we have all of this testing and it was a huge project and it cost a lot of money and which of these tests cost whatever. But this, what you are suggesting with Mr. Kleinrichert is just some amalgamation of everything that we threw into a pile for developing 1-MCP products, and I'm not sure I understand who is going to go through and say, each of those costs is associated with something relevant to this case and the trade secret issues, because it didn't seem like he could do that.

MR. MacGILL: Okay. Can we turn to the slide number 9, please.

And, Judge, if I may to be specific and answer the question you just asked me, so we've listed for purposes of an overview the different issues for jury resolution and summary judgment. I think it's useful for answering your question.

If we look at the left-hand side, in terms of

the trade secrets at issue, what we have done is listed these trade secrets specifically in relation to the disclosure that we provided to the Court last week in response to your request.

If you look at the trade secret misappropriation section, and specifically trade secret one, patent technology, treatment parameters, safety and use information, accumulated knowledge, business information, that's grouping. And then you look to the right-hand side, Your Honor, to the AgroFresh testing protocols, you'll see trade secrets 5, 4 and 8 are referenced there.

The witnesses that will provide the testimony as to the technology, development, the market development in each of these particular trade secrets that occurred over this period of time comes from those, general data. Mr. Cassidy, who will provide the assumption that I have provided to you and described to you, and Dr. Beaulieu, the current head of research. And what they will do is show that with respect to the legacy costs that are in these two exhibits, these Excel spreadsheets, they will show you that these legacy costs are costs that were incurred to develop these technologies and these trade secrets. Okay. Those two witnesses.

THE COURT: The technology and the trade secrets though aren't exactly the same. Right? Technology -- are

you saying, you said the technology and the trade secrets. So we have a list of trade secrets that you're asserting. Technologies can be broader than the trade secrets. Right? Not every technology you have was necessarily being asserted as a trade secret?

MR. MacGILL: That's correct. Not every technology we have, but the '216 patent technologies are our trade secrets. All of those are our trade secrets.

What was done to develop those trade secrets over a 14-year period of time, the precipient witnesses are Chandramouli with respect to the data, and then the linkage between Mr. Cassidy and Dr. Beaulieu that will be provided to say and confirm that these costs with respect, Your Honor, to the trade secrets that we have listed here are related to two components.

THE COURT: These costs. What are these costs? Just the big old number he gave you?

MR. MacGILL: No.

THE COURT: I would like to tie what you are saying their witnesses are going to do with what you want to do with Mr. Kleinrichert. Mr. Kleinrichert has two big numbers here, $116 million for costs of development of products and actually $223 million for products utilizing 1-MCP and then another 160 for SmartFresh. You're going to put those numbers in front of the jury and then you're going

to talk about some of the other things with some of the other folks, and I'm missing the connection here.

MR. MacGILL: Okay. Let me see if I can't do better with the description.

So if we put it in a logical sequence, witness number one, Mr. Chandramouli, you identified this during your January 18th deposition. What is this? These are Excel spreadsheets showing the costs that have been incurred over time in developing this product, this suite of products.

What years are included? Years X through Y, 2002 to forward.

All right. Next witness. Mr. Cassidy, what is your role with the company?

I am the financial officer and had the financial role and accounting role during this period of time.

Did you look at these materials?

Yes, I have.

Now, with respect to the costs that were incurred, can you tell the Court specifically, and the jury, can you answer, were these costs that Mr. Chandramouli provided, do these costs relate to, repeat, relate to the trade secrets at issue listed here, Your Honor?

Yes, they do.

Tell the Court how they relate to the trade

secrets at issue, Mr. Cassidy.

Second witness. Ann Beaulieu, Dr. Beaulieu.

THE COURT: We don't have the total number yet because we're only on the second witness or third witness now, and Mr. Kleinrichert hasn't testified?

MR. MacGILL: Correct. Third witness.

THE COURT: So these folks are just talking about them in generalities, not specific costs included?

MR. MacGILL: No. Chandramouli first is what we're contemplating.

Second, Mr. Cassidy. Mr. Cassidy, the Court has received into evidence these legacy costs, presumably.

And with respect to these legacy costs, would you tell the Court how these costs that are referenced here relate to the trade secrets at issue? Specifically --

THE COURT: Generally the trade secrets or each trade secret specifically?

MR. MacGILL: We would go through each one specifically as listed here.

Do they relate to the patent technology?

Yes.

How? Do they relate to the treatment parameters? How? Do they relate to the safety and fire information?

Yes.

How?

And going through that sequence would be what --

THE COURT: Are the costs going to be apportioned between the trade secrets or just say, all of these costs in here relate to the trade secret one. All of these costs in here relate to trade secret two.

MR. MacGILL: I believe they relate to the trade secrets which resulted in a product. If you look, Your Honor, at these trade secrets, each of them listed here, these trade secrets, were, in our view, appropriated by us and resulted in the TruPick product. You couldn't do TruPick without each and every one of these things.

Mr. Cassidy, TruPick was a product. Did TruPick involve each of these trade secrets, the technology, et cetera?

Yes.

Dr. Beaulieu, head of research. Yes.

Mr. Chandramouli has testified as to the Excel spreadsheets with these legacy costs. Have you looked at that series of Excel spreadsheets?

Yes.

Can you tell the Court and can you explain to the jury, how do these costs relate? Okay. The same series of questions.

Then, with respect to Dr. Beaulieu, one further

detail, Your Honor, from the standpoint of our proof. We would further ask Dr. Beaulieu the following:

Dr. Beaulieu, how do these trade secrets relate to the development of SmartFresh? Dr. Beaulieu, how do these trade secrets specifically, repeat, specifically relate to the development of TruPick?

Well, they all relate.

Tell the Court how. Tell the Court, tell the jury why.

Well, there is no TruPick without the '216 technology. There's no TruPick without any of these things. Okay.

Continuing with Dr. Beaulieu. So she testifies. There is one other Federal Rule 902(11) submission. There's the custodial affidavit from one of the Dow witnesses that will also connect up some of the same data. Okay. We supplied that to counsel and counsel has that. But with respect to -- counsel for the defendants has that.

With respect to that feature, Your Honor, I would add the following foundational note. That with respect to Mr. Chandramouli's data and Mr. Cassidy's testimony, Mr. Beaulieu's testimony, we would add questions to both witnesses, both precipient witnesses.

You have this additional data authenticating the Dow legacy cost. Do you have that, Mr. Cassidy?

Yes, I do.

What are these costs?

Okay. These are the costs for this period of time.

How do you know? This is what her affidavit says. Fine.

With respect to what she provided in her declaration, provided to this Court, how do these costs that she identified and she authenticated relate to trade secret 1 through 7 and these? Same line of testimony.

THE COURT: Who is going to do that?

MR. MacGILL: Mr. Cassidy and Dr. Beaulieu.

THE COURT: Were they there at the time?

MR. MacGILL: Well, we have authenticated, we have Mr. Chandramouli saying, these are the costs. We have this Dow witness saying, these are the costs. Then they -- and then Mr. Cassidy also has personal knowledge during his tenure.

With respect to those legacy costs, those are the foundational elements for their testimony. But with respect to what they then provide, we come to your first question. What does Mr. Kleinrichert do? Okay.

I've been in many courtrooms where I've had a lot of data where I've had to submit. Okay. And we could, of course, submit this and say, ladies and gentlemen of

the jury, here's the date. You will go back in the jury room. The Judge is going to allow you to have the exhibits.

THE COURT: I get it. You want to summarize it and add it up, but I'm not understanding why you need an expert to do that when you have all of these witnesses that are going to say, this is the data. I've been through the data. I've been through the spreadsheets.

Usually in a situation you're talking about the expert says, I've summarized the data and I have an opinion that's relevant to the case. Here he says, I added up the data and I don't know how it relates to anything here. Someone else is going to testify about it. How does this particular cost relate to a trade secret? It beats me. I just added the numbers. And that's where I'm getting confused. This doesn't seem like something that is properly the subject of expert testimony other than to have an expert stand there and put a big number in front of the jury whereas these other witnesses could be saying, look, I've looked at this stuff and, you know, they can add. The jury can add.

MR. MacGILL: We can have Mr. Cassidy do it. We can have Mr. Beaulieu do it, too, as a 1006 summary. We can do it that way, too. This isn't the first time this has come up. In the Southern District of New York, Your Honor, as you know, had this very issue that came up. This is

the case we cited, the Louis Vuitton case, Southern District of New York, 2015, reported at 97 F.Supp. 3d, 485 at page 504.

Interestingly, Your Honor, the expert for the defense is Mr. -- Ms. Mulhern. Her testimony, she gave testimony of the very same type of testimony that's being proposed here from Mr. Kleinrichert, their expert. Her testimony was moved to be excluded on similar grounds that they say here, and the Court, the Southern District of New York rejected that Daubert challenge to Ms. Mulhern, their expert, and said specifically that compiled and aggregated data is appropriate and it can be presented in a more readily ascertainable format for the jury. Ms. Mulhern's testimony, their expert in a different case, authorized as a summary.

So we don't do this in a vacuum, Your Honor, but there's one other point, or two other points we'd like to make quickly. Our Third Circuit here has been very specific about what the standard is for reviewing this type of evidence and we've cited multiple cases to the Court. But the Third Circuit has said repeatedly, at least three cases that we've cited to the Court, where this testimony would be helpful to the jurors. Okay. That's the standard that we believe applies to this particular issue.

And with respect to Mr. Kleinrichert, we would

submit respectfully that it is no small job to create a summary and that he would be better for purposes of your jury and this Court to be the person summarizing this data and presenting it in a more readily understandable format. That's what the Southern District of New York said.

And the third --

THE COURT: Does that intent to use Mr. Kleinrichert's costs --

MR. MacGILL: I'm sorry. I didn't hear the first part of your question.

THE COURT: Do you intend to use Mr. Kleinrichert's compilation of costs to calculate unjust enrichment damages?

MR. MacGILL: We do.

THE COURT: And are you planning to put a number for unjust enrichment damages in front of the jury?

MR. MacGILL: We are.

THE COURT: What is that number?

MR. MacGILL: The costs of development, we are going to put in the first element of the costs of development, which is what is the cost of developing this process had this been done legitimately. What is the cost --

THE COURT: What's the number? What's the number? Trial is in a month. Presumably, this has already

been disclosed, so what is the number you're intending to ask the jury?

MR. MacGILL: Could we go back to the summary? It would be -- the jury would be able to look at one of two numbers, 160.5 million or 223.5.

THE COURT: And where was that disclosed previously? Just here? I mean, he's not going to testify that this is unjust enrichment. He's just going to give a number. Right? Mr. Kleinrichert is not saying, my opinion is that they were, that defendants were unjustly enriched?

MR. MacGILL: No. He cannot and he will not.

THE COURT: So how is that number -- that number, what? It's just going to be argument in front of the jury? You're going to say Mr. Kleinrichert said it cost this much to develop it and therefore that must be the unjust enrichment that defendants received?

MR. MacGILL: No, I don't believe we get to do that. I believe this is completely up to the Court. This Court will decide how this is going to go, and here's why.

THE COURT: I need to know what you are proposing so I can decide whether I can decide this motion.

MR. MacGILL: What we're proposing is that we follow Third Circuit law that is the leading case in the United States on the topic, and the Third Circuit says to us, the Third Circuit is the leading light, so to speak, of

this standard, standard of comparison.

What we will ask for specifically, Your Honor, is a jury instruction which follows Third Circuit law and law throughout the United States. And what we're going to ask for in the form of jury instruction, we don't get to speak these words. Only the Court will speak to the jury on this.

The Court will decide what the jury instruction is, and what we submit, Your Honor, is the jury instruction that's appropriate here has three elements. The jury instruction will be that you're instructed, ladies and gentlemen of the jury, to make an analysis of whether or not there was unjust enrichment. There are elements for your determination as jurors.

Number one, what was the cost of development had it been done properly? If you feel, if you decide there was some inappropriate trade secret appropriation, what would be the cost of developing this appropriately? Element one.

Element two. What did the defendants spend? How much did they spend to develop the product? Subtract that. That's element two.

Number one, our number, 160, or 223.

Number two, their deduction for costs of development.

Number three, net element. It will be their discretion, your instruction, their discretion.

THE COURT: And how does the fact that they aren't doing anything and haven't been on the market with anything for more than a year and sold only a limited quantity fit into that?

MR. MacGILL: Excuse me one second. It's a very important question. This is law that has been around here, Judge, for 70 years. What our Courts have decided, Third Circuit leading decision, is that an appropriator of trade secrets, a misappropriator of trade secrets must not just answer in lost profits to the --

THE COURT: I get it. I know the law on unjust enrichment, but typically it would be, you know, that they are being enriched because they are selling this product and making money for it because they used trade secrets. But they were only on the market for a very short period of time. They have not been on the market for I think more than a year now. So I'm just trying to figure out, does that fit into this analysis at all, or you just say, that 500,000 or $700,000 they made, they were unjustly enriched by $219 million?

MR. MacGILL: I can tell you we can go circuit by circuit. We cited on brief the Ninth Circuit, the Tenth Circuit, the Eleventh Circuit of examples of exactly why the

Court's instruction should be as we've indicated.

Here's what the Tenth Circuit said -- I'm sorry, the Ninth Circuit in the Bornes case that we cited. It affirms the calculation of $9 million when the defendants saved "at least three years of development by its torts and plaintiff's yearly development cost of 3 million was found to be appropriate." The Eleventh Circuit, similar language.

THE COURT: Were those people all on the market at the time or not?

MR. MacGILL: I think there's a -- there are some cases that are and some cases that are not.

THE COURT: Can you tell me the ones that they're not? That's what I want to focus on right now.

MR. MacGILL: I will have to triple-check -- double-check this, but I believe that the Bornes case, the Salisbury case, and the Telex case were examples of where they were on the market. I will have to double-check that, but I think those are three examples where they were on the market.

THE COURT: They were?

MR. MacGILL: Were.

THE COURT: Okay.

MR. MacGILL: Now --

THE COURT: I'm just trying to understand if

there's any effect on all of this where they're not on the market.

MR. MacGILL: Okay. Yes.

And if I may answer one more specific. Judge Robinson listened to this case before, but for Judge Robinson, they would still be on the market. Okay. We stopped them, and we stopped --

THE COURT: I understand. I'm just trying -- I'm just trying to understand the fact that they're not on the market. Maybe you're telling me it means absolutely nothing under the facts of this case, but that's my question. Does that play into it at all, the unjust enrichment, you know, because typically, unjust enrichment is that they benefited to a certain extent because of using the trade secrets. And my question is: Does it matter if their benefit was for a limited period of time and they are not currently receiving any benefit?

MR. MacGILL: No, and decisively no for these reasons. Our courts have wrestled with this across the country and our courts have said consistently at the district court level and at the circuit level, they've said, this is an appropriate measure of damages, and it includes cost of development that you avoided. That's unjust enrichment.

And specifically, with respect to unjust

enrichment, what they're saying is that a misappropriator should not get the benefit of avoiding a cost of development, and that for purposes of definition here is unjust enrichment.

Now, one other piece of this that's extremely important. The damages that are available to the plaintiff here, depending on -- well, this Court will tell us what damages are available, of course, but the law says that there is a -- there are two elements of damages that may be recovered by the plaintiff in our circumstances.

One, we can get the costs of development, so we say, according to the authorities that we have given you.

And, number two, we get lost profits from their participation in the market. Okay.

They did participate in the market, Your Honor, in this case, so with respect to our profits and what is involved here, those are the two elements of damages that we would ask the Court to review and make decisions on in terms of instructing this jury at the end of the day.

Now, what's important about that? We asked their expert, Ms. Mulhern, from Analysis Group, we asked her specifically, Your Honor, is there any overlap in this case between our lost profits due to price erosion and the cost of development damages? Her answer: No, there is no

overlap.

So with respect to those conceptions and these details specifically, that is the -- that's the reality that we have.

Now --

THE COURT: So here's what I would like you to do since you're telling me I'm going to have to make some decision on -- we got kind of far away from the Daubert, but now you are telling me I'm going to have to make some kind of decision on the jury instructions on this issue.

I would like you to submit to me cases in which these damages are appropriate, you know, essentially all of the development costs are appropriate fair game when the defendant is not on the market or was only on the market for a limited period of time.

MR. MacGILL: Certainly. Could I adjust one sentence here? You asked me a question a few minutes ago. Mr. Ciulla handed me a case, the Telex case, which I did mention. It's the Tenth Circuit case. In that case, the product was not complete. The product specifically -- this was a theft that was proven by IBM against the defendant there, and they found that they did not complete the particular project.

And in the words of the Tenth Circuit, nevertheless, the trial court was of the view that Telex had

saved itself 10 million in development costs and that it was unjustly enriched in that amount. Tenth Circuit. We agree.

THE COURT: I get it.

MR. MacGILL: Okay. Enough said.

THE COURT: So that's one. That's a good example. I was just -- you know, any others that you have? There's a very big difference between $10 million and possibly 390, 380.

MR. MacGILL: May I add one detail that we think is very important? If I could go to the slide on the $100 million. The entire predicate for what these folks did at UPL is this. In 2016, they acknowledged themselves, Your Honor, that -- and here they congratulate one another on having misappropriated our materials, and here's what they say. This is an e-mail from Mr. Girin, the CEO at America.

He writes, and specifically he's writing the Chief Operating Officer Worldwide of UPL. You heard this morning as we started, the chief operating worldwide of UPL is here in our courtroom today, the man who replaced Mr. Karthik. Okay. This is the highest level of UPL, one of the defendants.

Here is what he said to the COO. Market assessment, 2015, global 1-MCP sales estimated at $200 million, mostly apples. And then he continues for what

we wanted to share with you this morning. Twenty-plus years of efforts by AgroFresh, ex-Dow, Rohm & Haas, and greater than 100 million, greater than 100 million invested to develop novel storage/ethylene ripening control. Private equity acquisition of over 800 million in mid-2015. Key patents expire after 2019.

Judge, in 2016, your defendant, UPL, is acknowledging at the highest levels that we spent over $100 million.

THE COURT: I get it. I get it. I've read the documents and you're making an argument to the jury here. I'm not making the decision here. I just want to understand for the Daubert issues and how as a legal matter what you intend to show as damages, where it was disclosed previously. And I'm trying to figure out, since you say I have to instruct the jury on what they are doing, whether it's appropriate under the circumstances here.

MR. MacGILL: All right. On the disclosure point that you raised, if I may go to that slide.

In 2016, Your Honor, again --

THE COURT: Is there any place that you disclosed, we are going to be seeking unjust enrichment damages of X?

MR. MacGILL: Yes. Repeatedly.

THE COURT: Where?

MR. MacGILL: All right. Let's go to --

THE COURT: Of X. I've seen in the interrogatories where it says, and will calculate that in expert testimony, but where is it that you said, here's my calculation?

MR. MacGILL: Okay. In terms of the disclosures that were given, in terms of the costs of development disclosures, they're here.

And the Court can see --

THE COURT: Where is the number? Did you ever give them a number so that until you just said today we're going to say to the jury either this one or this one or something, do they know the number? I just want to make sure their expert is not just making stuff up the night before he testifies because they don't know what's coming.

MR. MacGILL: Repeatedly.

THE COURT: Where?

MR. MacGILL: Repeatedly.

THE COURT: Where?

MR. MacGILL: Let me use one example. The head of our sales organization on the West Coast, Mr. Harker, Mr. Scott Harker, was deposed on December 6th, 2018. And if we could go, as referenced here, where he testifies specifically, and this is his testimony, and I believe all the lawyers, most all of the lawyers who are here were

there. Mr. Ivey was there. I think Mr. Williamson was in by phone, and there were some others as well.

He was questioned aggressively about how much did you spend historically on developing this product? How much did you spend?

Mr. Harker testified, AgroFresh did hundreds of millions of dollars worth of research to understand what 1-MCP did to apples in the storage room. That's our technology. We did thousands and thousands of trials with each new variety of apples that was coming out. Okay.

With respect to the legacy costs of development that occurred, we then had a variety of exchanges with counsel. Give us more detail. What else do you have?

THE COURT: I'm just asking as a matter of litigation, where did you, the plaintiff, tell the defendant, this is what we are going -- here's a number we are going to ask the jury for. Usually, you have an expert who says, my opinion, this is the appropriate measure of damages. I'm just trying to figure out, where did you do this? Saying we spent over $100 million isn't exactly telling them, by the way, here's our damages. Right?

MR. MacGILL: Right.

THE COURT: So where did you tell them, this is the number I'm seeking in damages?

MR. MM<okay. They knew it was 100 million. We

told them again in detail. They knew all of this going in. Mr. Harker was questioned aggressively about this.

THE COURT: So you didn't give them a number.

MR. MacGILL: We did.

THE COURT: Where? Where did you give them? I want the number that you are going to put in front of the jury. Where did you give it to them?

MR. MacGILL: December 12th, 2018.

THE COURT: Where?

MR. MacGILL: Okay. The exchanges that we had between counsel, what else do you have? December 12th, 2018. We produced the legacy AgroFresh development records from the Dow computer system. It was a third-party production. It took time to get it. What are we referring to? Right here. These Excel spreadsheets. So that was the disclosure that we made.

And then with respect to the continued questioning, December 18, Mr. Cassidy from AgroFresh, who we talked about previously, Your Honor, was questioned aggressively about costs of development and his trade secret information. The level of detail in that deposition was extraordinary. What did you do? What studies? How much cost? How many man hours? Those kinds of details were elicited specifically from his testimony on December 18th, 2018, the same day, Your Honor. If I may, the same day.

While the lawyers from Finnegan are questioning Mr. Cassidy, I'm questioning their CEO and he comes forward with the costs of development they want to have in element two of the formula that you will decide upon.

What was their cost of development? And what he says is, their cost of development was approximately $4 million. So they prepared not only to respond to us, but to inform the second element of the calculation on December 18th, 2018.

THE COURT: Did they ask you a contention interrogatory on what you were asking for number in damages?

MR. MacGILL: I'm reading right now, Your Honor, specifically. On December 20th -- on December 19th, we explained to them how we were going to go about calculating damages and the types of damages and what was included in the costs of development, and we indicated to them --

THE COURT: Did they ask you a contention interrogatory on damages?

MR. MacGILL: Not that I recall. And with respect to what we did do, Your Honor, is we explained to them there was expert discovery that was going to be coming forward. With respect to the expert discovery that was coming forward, we did exactly what Mr. Kleinrichert has done, is to summarize the details of the costs that were

already provided on December 12th through the third-party discovery to Dow, through the December 18th communications with testimony of Mr. Cassidy, and the December 18th testimony from the CEO of America.

Now, one item that's important, you may find important. On December 11th, Mr. Karthik, who is the chief operating officer worldwide, the former chief operating officer worldwide of UPL, I asked him about costs of development, and specifically he testifies as to their cost of development of this product, and he testified that it's approximately $600,000 to inform the second element of a cost, or a method of comparison calculation. So that was his testimony.

And then on December 10th, Mr. Ivey, I believe it was, in discussions we had with Judge Fallon, referenced cost of development. This is four days after Mr. Harker testified.

THE COURT: Did you give them the number for lost profits damages?

MR. MacGILL: We did.

THE COURT: So why didn't you give them a number for unjust enrichment?

MR. MacGILL: We did.

THE COURT: You've given me paragraphs here that never have a number in them. So what I'm trying to figure

out is, what's the number for lost profits damages?

MR. MacGILL: All right. Could we go --

THE COURT: And where did you disclose that?

MR. MacGILL: FTI. We have two experts from FTI.

THE COURT: And no one from FTI gave an opinion on unjust enrichment damages. Right?

MR. MacGILL: They gave a summary of these costs of development, a summary of what we produced, Your Honor, on December 12th in the legacy costs of development that were provided on a third-party basis from the Dow computer system.

THE COURT: Right. But for lost profits damages, you didn't just produce your financial reporting and say, hey, defendant, go figure out what our profits were and we lost them. Right? You have an opinion from an expert?

MR. MacGILL: We do.

THE COURT: Here, you don't have an opinion from an expert. Right? You just have the documents on general, overall costs for the development of 1-MCP and for SmartFresh, and then you want the jury to come up with a number based on jury instructions. Is that my understanding?

MR. MacGILL: We look at it a little

differently. We say that the data specifically to support the financial, the costs of development, element one of the comparison method, is right here in this exhibit. That is the data, and from that data we have prepared a summary of Mr. Kleinrichert. A summary of that data will be helpful to the jury and assist them in understanding this. They can cross-examine, and they will. You did this and that? That's not a good summary. We're not hearing that.

THE COURT: Well, we are kind of hearing that in that it's not relevant to some of the issues before us because there are things included in there that nobody can explain why they are included.

MR. MacGILL: Mr. Cassidy can. Dr. Beaulieu will, and that's the cross-examination for them. In other words, Mr. Cassidy, you say that this is related to the trade secrets. Tell me. Okay. I will.

Dr. Beaulieu, you are a doctor in this field. Tell us how this is related to those trade secrets. Tell me. Those are the cross-examinations pertaining to what's in here and what it means. Okay?

Let's go back to your lost profits question for a second. The expert disclosures were required in the January period of time and after pursuant to a court order. We gave a lost profits calculation that you asked about for Mr. Vince Thomas. Mr. Thomas provided an opinion distinct

from Mr. Kleinrichert, who summarized --

THE COURT: I get it.

MR. MacGILL: Okay.

THE COURT: I understand you have an opinion on one. You don't have an opinion on the other. And I get it.

MR. MacGILL: Okay. So I'm just answering your question, if I may.

THE COURT: You're not really answering my question, which is why I'm frustrated, but go ahead and say whatever you want to say.

MR. MacGILL: Mr. Thomas provided an opinion that was provided pursuant to the disclosures of the Court, disclosures required by the Court, and he gave that, Your Honor, he gave that opinion and provided the lost profit that has been occasioned by their entry into the market unlawfully, in our view. So that's the lost profit.

And the summary for Mr. Kleinrichert of what is here is what we have described. But that is the data, and I think it's important to focus on your question for obvious reasons. What is the data that supports this? It's this and it's that 900211 declaration from the legacy Dow employee. That is the data. Who is going to affirm its relevance? The witnesses we've described through their testimony.

And with respect to Mr. Kleinrichert, those predicates to his testimony are all subject to the Court's rulings and decisions as we go through the lawsuit and through the trial. But that is the testimony that would come forward on these topics. It's also possible that Dr. Zettler, the prior research and development head, might also give testimony tying up a portion of this, although we don't foresee that as necessary today. It could be. He's a former employee and now retired.

But that, Your Honor, is a summary of where we are in terms of the offer of this. And we understand the additional filing that you have asked for, but the existing rationales for confirming that unjust enrichment is measured in this distinct context legally as an avoided cost of development, we'll put further briefing out there for you in relation to your questions.

THE COURT: Yes. I don't want further briefing. I just want you to submit to me a couple of questions that I can read that answer my question.

MR. MacGILL: Okay. We will do so.

And then finally, Your Honor, I would just harken back to just two or three quick things in terms of the perspective of how do we have an efficient and appropriate trial.

THE COURT: Yes. You know what, I just want to

make clear, you're at about 45 minutes, so you might want to just save some time for the summary judgment.

MR. MacGILL: That I will do, Your Honor. Thank you.

THE COURT: Mr. Williamson, if you want to address any of those points, you may. I guess I would like to know, is there a disclosure from the plaintiff as to what is going to be sought in terms of unjust enrichment?

MR. WILLIAMSON: No, there's not, Your Honor.

THE COURT: Is there a contention interrogatory on damages?

MR. WILLIAMSON: We did a number of things. We asked a contention interrogatory on damages. That's DI 490, Exhibit 11 in this case. That contention interrogatory on damages was ignored for the entire course of discovery. It says, describe fully the method by which AgroFresh contends the amount of alleged damages in this case should be calculated, including a description of each damages theory that AgroFresh alleges should be used in a damages calculation, the specific factors that AgroFresh alleges should be used under each such damages theory, the amount of damages resulting from the calculation under each damages theory. Identify any documents, identify witnesses.

They ignored that interrogatory answer for the entirety of discovery. On the last day of discovery, the

day before the last day of discovery --

THE COURT: Is that December 20th?

MR. WILLIAMSON: That's December 18th. Discovery closed on the 19th. On December 18th, we put this interrogatory answer, their non-answer to number 9, our interrogatory number 9 in front of their 30(b)(6) witness, Mr. Cassidy, on cost and damages, and we asked him: Do you have anything more to add to what is shown here, which is a complete non-answer? And he said no.

The very next day, Your Honor, which is the last day of discovery, we get a supplemental answer that claims, we are seeking $250 million in damages and does not give us any theories whatsoever.

So this standard of comparison theory that you are hearing about now, which I would like to address, was never disclosed to us at any point ever, Your Honor.

So it's not just that it wasn't disclosed in an interrogatory answer. There are initial disclosure obligations under Rule 26 that require this disclosure to be made. Damages disclosures are built into the Federal Rules. We asked -- the cross-examinations that Mr. -- that Mr. MacGill is talking about, we asked those cross-examinations, Your Honor.

With your indulgence, I would like to show you some of the testimony that these witnesses have already

given as corporate representatives as to the connection between the costs and the trade secrets that they are asserting in this case.

We went after that. Despite not knowing their theories, we went after that anyway, and they've already testified about all of this. They have disclosed complete ignorance to being able to address the trade secrets and the connection between the trade secrets and the costs. Chandramouli, Cassidy and Beaulieu, all of them. So this has been dealt with in discovery. What we're talking about now is reinventing this entire case now with a theory we've never heard of before. Their expert doesn't come in. They have no expert on damages and unjust enrichment, which is highly, highly unconventional.

The idea that we would just throw all of this is -- enormous number. These spreadsheets, we can take a look, Mr Lee, maybe quickly. Just pop one up. And I should mention, Your Honor, there are a number of corporate representatives in the room today. We've agreed, and counsel has accommodated, that we won't be shuffling in and out because we're just going to be touching on some things very briefly here even though they're designated under the protective order. That has been agreed upon?

MR. MacGILL: Agreed.

MR. WILLIAMSON: Okay. So if we could just pop

up quickly, Mr Lee, your reference No. 19, which is one of these spreadsheets that we're talking about.

On the second page you can see, this is a 15,000 line spreadsheet, line items of costs, and they are obscure. They are things like other expenses, $950,000. No one can link these. No one has tried to link these to the trade secrets at issue. What they want to do is throw all of this before the jury and have some hand-waving-type testimony that our development of our company is in the hundreds of millions of dollars. We did lots of studies, but nobody is actually going to explain, okay. Line item number 14953, that actually, that actually is an R&D cost that goes to an experiment we did and then made public in one of our hundreds of patents. And so that's not part of this case. That's irrelevant. By definition, it can't be a cost that we avoided because of the misappropriation. Nobody is going to do that. Nobody can do that. We've already been through all of that with the fact witnesses.

So the theories have not been disclosed. The methodologies have not been disclosed, not in 30(b)(6)'s, not in interrogatory answers, not in their initial disclosures. We have asked, we have asked repeatedly. We were before Magistrate Judge Fallon on a number of these issues over and over again on their fair disclosures of their damages case. What they're actually proposing to do

at trial, Your Honor, will contravene Judge Fallon's express orders in this case. And, in particular, this trilogy of witnesses here that we're going to have Mr. Chandramouli come in and then Mr. Cassidy come in and Ms. Beaulieu come in, that is expressly in contravention of the magistrate judge's orders. It's a tactic that they've employed. What they've decided to do is not disclose the actual witness who is going to stand behind an opinion for unjust enrichment. The statute in this case, both the state and federal trade secret statutes, require that any avoided development costs, any unjust enrichment -- I'm sorry, any unjust enrichment be caused by the misappropriation. And what that means is, if they're going to use their costs as a proxy for costs that we have allegedly avoided, they have to be costs that are connected directly to their trade secrets, not something else.

And what would happen in discovery, Your Honor, is, we would take a deposition on a key witness and whether it be a trade secret issue or fact issue, and after the deposition was closed, what would happen is, AgroFresh would file a supplemental Rule 26(a) statement identifying a witness identifying subject matter that we just covered. We brought this practice to Magistrate Judge Fallon's attention.

And if we could go to Reference 5.5, please,

this is a December 10th, 2018 transcript. We'll look, please, at page 66, 7 to 15. We actually moved to preclude the witnesses, Your Honor, these late disclosed witnesses who kept popping up in new Rule 26 statements.

And the Judge said she's not going to exclude the witnesses, but we're at lines 7 to 15. What she says is, she's going to order on line 10 that the limited relief -- I'm sorry, on line 12. She's going to order to grant proper disclosures within a week of today's date. She's not going to exclude the witnesses. She's going to give us depositions, but a proper disclosure under Rule 26(a)(1). And towards the end of the page on 22, line 22 to 24, she specifically called out, because this is the problem we were having, the subject of that information. That the disclosing party may use to support its claims or defenses. That has to be used to support the court order.

On the next page, to put a fine line on it, page 67, lines 1 to 5, that's the operative language of the rule she's focusing on, the subject of the information. A proper disclosure of the subject of the information that these witnesses possess.

So AgroFresh goes ahead and files the amended Rule 26 statement that is supposed to give us the roadmap that we were supposed to have at the beginning of discovery, and that is, if we could go to Reference 6, please, Mr Lee.

And here we are. If we go to page 4, Item 1, they disclose Mr. Cassidy has, and the third line down, has information concerning the cost of development, information concerning the cost of development.

Page 7, item 24, they disclose Mr. Chandramouli. Item 24. May have discoverable information concerning the cost of developing AgroFresh's 1-MCP technology.

After the court order, those are the only two witnesses they disclose. Dr. Beaulieu is not in this disclosure. Dr. Beaulieu gave us, Your Honor may recall, a Rule 26(c) employee expert report as a rebuttal with no opening expert report on trade secrets, as a rebuttal to our report on trade secrets. And Dr. Beaulieu's report goes into the technical nature of the trade secrets. It does not go into costs of development. She was not disclosed as a witness on costs of development.

And we deposed both of these Court ordered and disclosed witnesses already. These witnesses who are supposed to be coming to trial and filling all the gaps and doing a calculation, and really doing a calculation is what we're talking about. Some witness is going to connect these tens of thousands of line items for every year to the specific trade secrets and then do some sort of calculation, which we have not seen, ever, and have never seen and don't even know what it is.

Mr. Chandramouli for his part, Reference 8, please, Mr Lee. This is Chandramouli's deposition testimony on the very point that Mr. MacGill was suggesting Mr. Chandramouli would testify to at trial.

We asked him: Do you have any knowledge of the trade secrets that AgroFresh is claiming in this case?

Remember, he is the one who has been identified to us, the cost of AgroFresh's development, and it has to be for the trade secrets. It can't be something else. That's the whole point. The point of our motion is, relevance here is defined by the trade secrets, which is a separate issue as to what that means given their trade secret disclosures, but we know the law requires that the relevance for an unjust enrichment claim has to be defined by the trade secrets.

He professes ignorance about any of the trade secrets. He doesn't have knowledge about the trade secrets. He has no knowledge of the cost of development of any trade secrets that AgroFresh is claiming in this case. That's the person they want to bring in to fill in this gap, to plug the hole they have on foundational relevance, which is entirely improper.

We took him through nevertheless each and every trade secret, so one by one. Categorically, he has denied it. We went through belt and suspenders.

If we could turn to page 128, lines 5 through 16. We took him through each and every trade secret. An example would be Decco 72503. This is with the trade secret in hand and the witness in the chair, Your Honor, were going to walk through the trade secrets.

We could take a look at Decco 72503 quickly, Mr Lee, if you would. This is a disclosure that AgroFresh included in its trade secret disclosure. They're alleging that this data, this data right here has been misappropriated. So we get right down to the details. If we could go back to the deposition testimony, please.

We asked him, for this trade secret, can you tell me what their specific costs of development are? And the answer is, no, he does not know it, and he doesn't know any document. This is the guy who is bringing the documents now into trial. He doesn't know of any document that can show us that. We got the same answer for every trade secret as well as categorical denial.

So what we're talking about is a witness, his subject matter and his presence and his testimony in this case was ordered by Judge Fallon. We took his deposition and this is what we got. He should not be permitted to come in here at trial and give some sort of different testimony, some sort of different calculation we've never even seen.

So --

THE COURT: I'm assuming this is part of a motion in limine that yet hasn't been brought, because I don't think it's right in front of me at this moment. Right?

MR. WILLIAMSON: We are objecting to Mr. Chandramouli as a witness to do this, yes, as part of our pretrial. We will.

THE COURT: I understand you're dealing with it now because that's what the plaintiff said they were going to do to bolster the Kleinrichert testimony. I understand that.

MR. WILLIAMSON: Exactly.

THE COURT: You don't have to get into too much detail on this because I'm assuming it will come later.

MR. WILLIAMSON: Exactly, Your Honor. The point here is, our Daubert motion on Mr. Kleinrichert is focused on relevance, and really, that he is -- almost two things. He's a conduit of information. He's a conduit of what they are calling business records. We also think those are inadmissible for a whole host of reasons. Again, we don't need to get into that now. But he's a conduit of information and he's a conduit of irrelevant information. That's the point for today.

What they are saying in response to that is,

well, we can go back and they recognize that they have a foundational relevance problem because just throwing a huge number in front of a jury is prejudicial, it has got all kinds of problems associated with it under Federal Circuit law in terms of skewing the damages horizon, and the Unilock case. It's prejudicial under Rule 403. It has all sorts of problems. They know that what they are supposed to have done is link their costs under the statute. Unjust enrichment has to be caused by the misappropriation. Avoided development costs cannot be costs for an entire company. They cannot be costs to develop patents that are made public.

Importantly, Your Honor, they cannot be costs associated with trade secrets that they have explicitly withdrawn from the case. They know they have this foundational relevance problem, and that's why we're addressing Chandramouli now, because they are coming back and saying, we can fix that at trial in real-time. Don't worry about it, Your Honor. They will all see what happens here, the calculation, the methodology, the answers to interrogatories we should have gotten long ago. They'll see that all in real-time at trial and Mr. Chandramouli will be right out in front of it. But as it turns out, that can't happen in terms of the relevance foundation for Kleinrichert. This is a preview, sure, of a different

issue, but nevertheless, for Kleinrichert, as the relevance foundation, this should not be permitted given what he has testified to already.

The same thing applies even with more force with Mr. Cassidy, Your Honor. And if we could, if the Court wishes to --

THE COURT: I understand.

MR. WILLIAMSON: I will summarize. We went through the trade secret disclosure one by one and what he told us was, sure, we could take these costs for this trade secret. We could trace it back through our ledgers. I would have to go and talk with our head of R&D, have to figure out what tests we did. I will have to go back to the general ledgers and offline R&D statements. We could trace it all the way back and we could give you a number associated with just that data for each of the trade secrets. That is his testimony. Have you done it? No, I have not done it. I have not done it. And it's based on unproduced information. Offline R&D budgets and ledgers that we don't have. They didn't go back and fill that in.

In an interrogatory answer -- we have an interrogatory answer number 10 on costs, Your Honor. We moved to compel twice on that interrogatory answer and Judge Fallon granted our motion to compel twice on that interrogatory answer. They did not go back and say,

okay. We're going to go ahead and tell you what the costs are for the trade secrets. They've never done that. In fact, today, what that interrogatory answer says is, see Rule 33(d). If you would like information on costs, search our document production for the word, quote unquote, "cost." It yields over -- there are different ways to search, but it yields around or over 10,000 results of which this handful of spreadsheets that now they say are central to their case are buried in there, buried in there among 10,000 documents.

So they never called out the data to us. The witnesses, who they were compelled to give us, -- the witnesses they were compelled to give us didn't know anything about the trade secrets or the costs of developing the trade secrets. This entire argument that the foundational problem, which they recognized, the foundational problem for Mr. Kleinrichert can be somehow fixed on the fly at trial? That just, against this record, Your Honor, should not work, against this record.

And I do appreciate much of this is a forecast of arguments to come on evidentiary issues as part of the pretrial, but, nevertheless, we have what we believe to be very strong corporate testimony that they should not be able to deviate from on these very points.

Your Honor, I did want to address generally this

jury instruction and the Third Circuit's --

THE COURT: Yes. We're not going to deal with that right now.

MR. WILLIAMSON: If I may just briefly note the standard of comparison, what has been disclosed, a Third Circuit case, the standard of comparison does not involve the plaintiff's costs at all. It does not involve the plaintiff's costs at all. The International Industries versus Petroleum --

THE COURT: Yes. I got it. I said we could deal with it later.

MR. WILLIAMSON: Thank you, Your Honor. Can I address any other specific --

THE COURT: No.

MR. WILLIAMSON: Thank you, Your Honor.

MR. MacGILL: Just very briefly Your Honor. Returning to the sequence of the litigated events here, if we could go back to costs of development slide.

Judge Fallon, as Mr. Williamson just reviewed, Judge Fallon, the costs of development issue was litigated and it was expressly before your Magistrate Judge.

On December 10th, Mr. Ivey referenced specifically the cost of development in his argument with Judge Fallon. You've now seen and heard in the courtroom here what Judge Fallon ruled and how this was going to go

forward on the subject of a, one, an initial disclosure. Counsel just reviewed that with you.

Two, we filed a supplemental interrogatory on December 19th, 2019 -- I'm sorry, '18, consistent, Your Honor, with what Judge Fallon directed. And we indicated that the methods, in that interrogatory pursuant to the litigated result, the methods of calculating damages and the times of damages included, in pertinent part, the cost of development the defendants avoided by misappropriating AgroFresh's technology in an amount to be determined by expert testimony.

Seven days prior after this December 10th litigated result, we got the third party documents from Dow, and they were produced on December 12th, 2018, as you can see.

Now, two other quick points. You saw reference to Mr. Chandramouli about the AgroFresh, to repeat, AgroFresh costs of development. Mr. Chandramouli knows about the Dow cost of development. That's his testimony. The AgroFresh, we acquired the company and the technology and the rights in 2015. Cost of development for that period, 15 to time today or slightly before today, is Cassidy. Cassidy is going to confirm those details.

Now, one other thing, and I didn't have the answer when you asked me the question when I stood up

initially. Did you ever disclose the cost of development number? And I didn't have an answer.

THE COURT: No. I asked if you disclosed the unjust enrichment number that you're going to be seeking at trial.

MR. MacGILL: Fair correction, of course. 250 million. On December 19th, 2018, after this litigated result that you just referred to, Judge Fallon told us --

THE COURT: Is that the total damages you're seeking or just unjust enrichment, that 250 million?

MR. MacGILL: Defendants avoided by misappropriating AgroFresh's technology in an amount to be determined by the expert testimony and we referenced the $250 million number.

THE COURT: Read me the whole sentence there without you saying that we referenced it.

MR. MacGILL: Okay.

THE COURT: Tell me what it says.

MR. MacGILL: Yes. And these, Your Honor, are the interrogatories of December 19th. The supplemental answer as directed as a result, as a result of this process that you now heard about.

Supplemental answer. The entirety is as follows: By further response, by way of further response, AgroFresh incorporates by reference its responses to Decco

Interrogatories 2, 5 through 8 and 10 through 12, and initial disclosures (along with the supplementation of both the interrogatories and the initial disclosures).

Continuing with the quotation, Your Honor, the methods of calculating damages and the type of damages include compensatory damages, punitive and exemplary damages, treble damages, attorney's fees and costs, reasonable royalty damages, lost profits, including lost profits due to price erosion, diminution in enterprise value and the cost of development that defendants avoided by misappropriating AgroFresh's technology in an amount to be determined by expert testimony. Persons with knowledge of the damages, of the damage includes Scott Harker, Alice stare hill and John Cassidy.

AgroFresh incorporates by reference the deposition testimony given by these witnesses. In addition, any, almost any person at AgroFresh at the postharvest or in the postharvest industry including customers likely are aware of the immense damage to AgroFresh caused by the Decco defendants.

Continuing, Your Honor. The amount of damages to AgroFresh from Decco defendants' wrongdoing is in excess of $250 million, which will be confirmed through expert testimony.

Then, Your Honor, with respect to the opinion,

price erosion, that came pursuant to the expert disclosure in the amount that we discussed generally, around 14, 12 million, $14 million with interest. And then the data here, the data from Cassidy and the data from the Dow employee that I mentioned through the 90211 submission. So that was the result.

THE COURT: But two of the witnesses that you've just told me you're going to rely on for unjust enrichment, whose names, unfortunately, I don't remember, Dr. Beaulieu and Dr., not Cassidy, but the other person, weren't listed in your interrogatory answer there.

MR. MacGILL: Well --

THE COURT: Is that right?

MR. MacGILL: No, ma'am. I think they were, Your Honor. Mr. Harker, who testified on December 6th --

THE COURT: But people that you've told me you were going to call, witnesses 1, 2 and 3, Beaulieu was three.

MR. MacGILL: Cassidy, Beaulieu and perhaps Dr. Zettler, the prior head of research and development.

THE COURT: And Dr. Beaulieu wasn't listed though.

MR. MacGILL: No.

THE COURT: I don't know if it's Dr., Mr., Ms. Zettler. Was that person listed?

MR. MacGILL: Was Dr. Zettler listed?

THE COURT: In the interrogatory that you just read?

MR. MacGILL: On cost development? No.

THE COURT: On anything relating to damages?

MR. MacGILL: Well, yes. I mean, Dr. Beaulieu is an expert in the case, as you know.

THE COURT: I just asked you, was Dr. Beaulieu listed in the interrogatory response you just listed? The answer is no. Right?

MR. MacGILL: The answer is no.

THE COURT: And what about -- I don't know if it's Ms. Zettler, Mr. Zettler, Dr. Zettler. Was that person listed in the interrogatory response?

MR. MacGILL: Not in the --

THE COURT: That you just read to me?

MR. MacGILL: Not in the cost interrogatory, no, but they are the trade secret witnesses that we have referred to.

So the trade secret relationship between the cost is what they will refer to, is what they will testify to, with respect to those details.

Now, with respect to the final point that we wanted to make as to the foundational arguments that are being made with respect to these costs of development, cost

of development has been litigated and understood for a long, long time.

THE COURT: You know what, this is the subject of an evidentiary motion that's not in front of me.

MR. MacGILL: Understood.

THE COURT: No need to cover that.

Okay. I am going to consider the arguments that have been raised here and will get you something on the Daubert motion in due course.

Next, I would like to discuss the motions for summary judgment. The omnibus motion includes eight motions denoted SJ 1 through SJ 8. I think I've already addressed SJ 5 and SJ 8 in my May order, which I denied those in light of the stay relating to the '216 patent, which needs to refile.

One question I had for plaintiffs, Summary Judgment 4 seeks summary judgment on reported criminal penalties, and AgroFresh stated in its papers that it wasn't current in attempting to seek criminal penalties or something like that. But Summary Judgment 4 was listed in your chart up on the screen.

So are you or are you not intending to seek criminal penalties at this trial?

MR. MacGILL: Your Honor, the answer is the economic espionage that's involved in this case is an

element of our substantive legal claim, intentional interference. So it is not separately, we're not going to ask you to give a jury instruction penalized for this because it's a crime. That is an element of our proof that we will present to you and to the Court in evidence. That is economic espionage occurred, which means there was no justification for the conduct, and furthermore, it is wrongful conduct because it was criminal conduct. We're not asking for a penalty because of the criminal violation. We're asking for punitive damages under substantive law.

THE COURT: So the motion asks that AgroFresh, says AgroFresh cannot seek criminal penalties for the claim. You agree you are not seeking criminal penalties for the claim?

MR. MacGILL: We are not seeking criminal penalties for the claim.

THE COURT: So based on that representation, AgroFresh will not be allowed to seek criminal penalties at trial. I understand there may be some overlapping issues of evidence, but you will not be seeking criminal penalties at trial, and so I'm going to deny that motion as moot.

MR. MacGILL: Understood.

THE COURT: Okay. The remaining motions relate to trade secret misuse, conversion claim and assertion of the two dated patents, both of which are expired, are

invalid for written description, and that actually reminds me. Can somebody explain to me where the patents fit into this case, because everything I've read seems to focus on trade secrets and the '216 patent, but we have these two expired patents. And as I understand it, you're also asserting them against, in the Hazel case where you have now included Decco in that litigation.

So, plaintiff, what are we doing here?

MR. STOVER: Sure, you Your Honor. Chad Stover. I can address that.

So the Daly patent claims are two patents, the '849 patent, the '068 patent, and they have been a part of this case from the very beginning as an infringement argument with price erosion damages.

THE COURT: Separate from the other damages?

MR. STOVER: Yes. It is a separate -- there could be -- yes. To answer your question, yes. And we have a report, damages report on those patent damages from FTI.

And so, and you also mentioned the Hazel case. That case involves a different product. So in this case we're talking about the TruPick product. In that case, we were talking about a different product from Hazel.

THE COURT: Great. Okay.

MR. STOVER: Thank you.

THE COURT: Okay. So I would like to take the summary judgment motions a little bit out of order and I want to start with number seven, which is the '068 patent being invalid for lack of written description. And the arguments that are presented by both sides don't really address written description. Instead they seem to focus on whether I should correct the claim in some way to address the '110 issue.

So, defendant? Mr. Ivey?

MR. IVEY: Your Honor, with the Court's permission, Mr. Gupta will address that issue.

THE COURT: Okay. Sure. Mr. Gupta. So tell me, what is this argument that you are making? Let's say that I agree with you and I'm not correcting the claim. What do you want me to do, because it all seemed to me you were saying there's no written description support if you changed it to N14, but I didn't see anything about no written description if it's left where it is with N16.

MR. GUPTA: Yes. So to answer that question, question directly, Your Honor, N is written in the claim as one percent.

THE COURT: I get it. My question is, assume I leave it just like that.

MR. GUPTA: Then it is undisputed, it is undisputed that there is no description of any compound

which has N is equal to 5 through 10. Those just do not exist as per the plaintiff's admissions, so there is absolutely no description whatsoever for the compounds from N is equal to 5 through 10. So that is just dispositive of that issue.

THE COURT: It's other than in the specification, it says 1 to 10 multiple times.

MR. GUPTA: That is correct, Your Honor, but just the fact that that claim language is repeated in the specification does not provide description sufficient to show of one of ordinary skill that the inventors here were in possession of a compound with N is equal to 5 through 10. It just does not. And the mere fact that those words from the claim are repeated in the specification does not cure that deficiency.

THE COURT: Okay.

MR. GUPTA: And as far as, if Your Honor would like me to address the fact about why this correction cannot be made by the Court, I am happy to do that.

THE COURT: No.

MR. GUPTA: That is the fundamental thing. The plaintiffs admit that they do not exist and therefore there cannot be any written description for that range.

THE COURT: Okay. Let me hear from the plaintiff.

MR. STOVER: Chad Stover on behalf of AgroFresh, Your Honor.

So, Your Honor, you hit on the point that we made in our briefing, which is that you have a title here that says, lack of written description is the title of their argument, but when you look at what they are actually arguing and the cases, the two cases, the Rembrandt case and the Nuvo decision that they cite, those are indefiniteness decisions and don't say anything about lack of written description, and so there's really no argument that they've made, and certainly no case law that they've cited, no case law that we're aware of that would find a lack of written description in a context like this, where they claim that the claims appear to cover nonexistent classes of compounds. And I think for just that reason, the motion should be denied.

And if you were going to reach the other issue of whether or not to correct the claims, and I believe we have an argument we could make on that, but I don't really think that's properly before Your Honor under the motion as it was stated.

THE COURT: So is the issue of correcting the claims going to be something that comes up or not? I mean, I'm just trying to figure out, is this a claim construction issue and it wasn't previously raised or is this something

that I don't need to address?

MR. STOVER: I don't think it's before you and so I don't think you need to address it.

THE COURT: Okay. But I just want to make sure it's not going to come before me the first day of trial. I want to make sure we're all good with claims saying 1 to 10, or are we not? Are you going to say, no, no, No, Judge?

MR. STOVER: From AgroFresh's position, we're not going to say you need to fix it. I can't speak for them obviously.

THE COURT: Mr. Gupta?

MR. GUPTA: Your Honor, I mean, this is a situation where they're not asking for the claims to be fixed during the trial, but then they keep arguing that the claim is properly written.

THE COURT: So are you going to ask me to fix it? I don't think so based on what you told me that I can't fix it.

MR. GUPTA: Right.

THE COURT: So I just want to make sure I'm not going to have some surprise here, where there's another judge, you've got a claim construction issue you need to deal with in the middle of trial.

So they told me they're not seeking to have the

claim corrected or changed. Is defendant?

MR. GUPTA: So, Your Honor, if AgroFresh is not seeking to have this claim corrected, that means the claim language is as it's written.

THE COURT: I'm just asking you a question. You are not asking it. Okay? If they're not asking to have the claim corrected, are you?

MR. GUPTA: No, we're not, Your Honor.

THE COURT: Okay.

MR. GUPTA: And the claim as written then therefore is inoperative and cannot stand as properly disclosed or enabled under Section 112, paragraph 1.

THE COURT: Okay. So I will take that under -- oh, one question I did have for plaintiff, Mr. Stover. So you said that you are not seeking to have it corrected, but just so that I understand. In the papers it sort of seemed like you were, but I wasn't sure what you were asking for. So I just want to make sure. Maybe I shouldn't even open this door.

So --

MR. STOVER: I think our primary argument, Your Honor, is that the focus of their motion was lack of written description and there's no support for that argument. Therefore, it should be denied.

THE COURT: Even for N equals 1 through 10?

MR. STOVER: Correct.

THE COURT: Okay. Got it. Thank you.

MR. STOVER: Thank you.

THE COURT: Okay. So let's go to summary judgment number 6, which seeks summary judgment, the Daly patents are invalid for lack of written description. And I guess my first question is for both sides.

Mr. Gupta, is there any dispute that the term cyclodextrin when broader in the claims, not limited to alpha cyclodextrin, that that term encompasses cyclodextrin other than alpha cyclodextrin?

MR. GUPTA: We believe we do not have a dispute on that. I think it's undisputed that cyclodextrin is broad enough to encompass three types of cyclodextrin's, alpha, beta and gamma. And the specification only provides support --

THE COURT: No, I understand.

MR. GUPTA: Yes.

THE COURT: I'm just taking one question at a time here.

And, plaintiff, who is dealing with this? Mr. Stover?

MR. STOVER: Yes, Your Honor.

THE COURT: Do you agree there's no dispute here that the term cyclodextrin encompasses cyclodextrin other

than alpha cyclodextrin?

MR. STOVER: That's correct.

THE COURT: Okay.

MR. STOVER: It includes beta and gamma.

THE COURT: And does it also include things other than alpha, beta and gamma? In your papers you showed me where it was defined, and then you kept saying, including alpha, beta and gamma, but I wasn't sure if you were saying including only or including but not limited to?

MR. STOVER: To my knowledge, it's just alpha, beta and gamma.

THE COURT: And what's defendants' position on that?

MR. GUPTA: There are just the three unmodified forms of cyclodextrin, which are alpha, beta and gamma. There's a whole different class of compounds called modified cyclodextrins, and in terms of the motion that is in front of the Court, the briefing relates to beta and gamma as not being adequately described.

THE COURT: Right. So the issue here is whether there's support in the specification for cyclodextrin, beta cyclodextrin and gamma cyclodextrin?

MR. GUPTA: Yes. More properly, whether there's support for a complex form by 1-MCP and the different, other different forms of cyclodextrins. Namely, beta and gamma.

THE COURT: Okay.

MR. GUPTA: Not just whether beta and gamma are described in the specification. Whether a complex can be formed and whether that is what the invention was directed to and whether the inventors here were in possession of any complex forms between 1-MCP and beta and gamma and whether those were actual compounds or complexes that the inventors actually invented as per the Ariad case, which is required for the inventors to show in order to get a patent broad enough to encompass those.

THE COURT: All right. Any response on that one?

MR. STOVER: Chad Stover, Your Honor.

Were you looking for a response just on that question or on this issue?

THE COURT: No. Just on the issue.

MR. STOVER: On the issue in general.

Yes. If I could bring up -- here we go.

So the fact that the specification of the two patents focuses on alpha cyclodextrin is not dispositive of this issue, and I think the main case that we rely on for that is the Centrak case cited in our briefing. There's also another decision from the Federal Circuit called, I believe it's Scriptpro. It's cited in the Centrak decision. That's a very recent, February of 2019 decision from the

Federal Circuit.

And it says, and the Scriptpro case says as well the specifications focus on one specific embodiment or purpose, cannot limit the described invention where that specification expressly contemplates other embodiments for purposes.

And here, and on this slide, I quoted three paragraphs from column 11 of the '849 patent, the same specification is also present in the '068 patent, that talks specifically about beta and gamma-cyclodextrin and the complexing of those cyclodextrins with the 1 FCP in the patent, which is what the patent is talking about.

So we have a case here where there's actual express disclosure in the patent, which is different than any of the decisions that were cited to you by defendants.

And then another thing that I would like to note. In addition to the express disclosure, there is also disclosure of cyclodextrins in general, and then specifying those as including alpha cyclodextrins, so cyclodextrins being broader than the alpha cyclodextrin throughout the specification and also throughout the original claims that were part of the specification that were filed.

We have an expert, AgroFresh's expert, Dr. Thompson, who looked at the Daly patents, including these specific portions, and he came to the conclusion that he

believed there was no written description problem. And he also noted an issue that their expert, Dr. Dinka had, that was in the obvious context.

Dr. Dinka took a look at prior art that included cyclodextrins in general, beta, gamma cyclodextrin, and said that it would be obvious to combine that with 1-MCP, but then when he came to the written description portion of his report, he sang a different tune. And so we believe Dr. Thompson has opined. We believes that that contradiction further supports there's no written description problem here.

They focus on the deposition testimony of another expert of AgroFresh's, Dr. Walton, and Dr. Walton is not AgroFresh's expert on the validity of the daily patent. Dr. Thompson is.

And, second, if you look at the deposition testimony that they quote and cite from here, they're overstating what she said. What she said was merely that the specification focused on the alpha cyclodextrin embodiment, which is not something that is disputed, and under the Centrak case is not something that means that there's a lack of written description, especially in light of the express indefinite description that is present in column 11 and throughout the two Daly patents.

They also cite to the '216 patent and a

statement in the '216 patent that says, a stable complex has not been formed in beta or gamma with 1-MCP. That's irrelevant first because it's outside the four corners of the patent and the Ariad decision, Centrak. A bunch of Federal Circuit decisions say you are supposed to focus on the four corners of the specification read in light of one of a person of ordinary skill in the art. And plus the statement in the '216 patent is relevant, if anything, only to enablement and not to lack of written description, and they have not brought a motion on lack of enablement.

Unless Your Honor has any questions, that's all I have on that.

THE COURT: Thank you.

MR. STOVER: Thank you.

THE COURT: So, Mr. Gupta, why isn't this what you are suggesting really, especially in light of the Centrak case, why isn't it more an issue of enablement, which is not the subject of the motion?

MR. GUPTA: Yes, Your Honor. I will take those two things separately and say that first the Centrak case, the plaintiff pointed to.

So the Centrak case factors are actually quite different, and the reason why the Centrak case factors are different is there, what was at issue, there was a detailed embodiment that dealt with infrared technology, and then

there was a short description of how that would work for ultrasound technology.

THE COURT: Right. But there was no specifics on how you would change the technology in order to make it appropriate for ultrasound?

MR. GUPTA: So there were certain components that were disclosed, but not all the components that were disclosed, and that was the issue that was raised there. But what the specification there, the Centrak case seemed to disclose, was that the inventors were in possession. That they actually had invented something that was with ultrasound technology. It's just that they hadn't provided all of the details. And that is the critical decision.

THE COURT: I'm not sure that's consistent with the facts though. I thought there was some issue with folks knowing they had never made an ultrasound.

MR. GUPTA: But in the specification, they had provided enough detail.

THE COURT: But in the specification here, they refer to alpha, beta and gamma.

MR. GUPTA: Correct, they do, and we're not disputing that the specification does not list those three forms of cyclodextrin as the molecular encapsulation agent generally. So if I may, I think it might be helpful to the Court if we see what are the differences and why that

difference is significant and why that leads us to believe that the inventors here cannot have been in possession of a complex that is formed with beta and gamma.

So with the Court's indulgence, if I may just very briefly.

Here, this is the passage that the plaintiff is pointing to, saying that, yes, there are three forms of cyclodextrin that is disclosed here, and those are alpha, beta and gamma. Where they specifically differ is, because alpha is limited to only six members in that ring, you go to the next line, that's 7 and 8.

And why is this different, important? This difference is important because that leads to a much larger opening size for the other two cyclodextrins, namely the beta and the gamma. And why that matters here is because you're trying to encapsulate a 1-MCP molecule. This is a very small --

THE COURT: You don't think this is something to me that there might be some factual issues that need to be resolved?

MR. GUPTA: Because --

THE COURT: I mean, you're giving me a lot of specifics here that are based on attorney argument.

MR. GUPTA: But I think the important thing to focus on is to go back on the, to the specification, and in

the specification, the only disclosure that relates to beta and gamma cyclodextrin are in the form of, these are cyclodextrin forms. These are molecular encapsulation agents that can be used. And this is where the specification is lacking, because as in another recent case that came out, Nuvo Pharmaceuticals case, also there was a similar issue. And the Court recognized there, and I'm quoting, in light of the fact that the specification provides nothing more than a mere claim that, in that case it was uncoated PPI, in this case it would be beta and gamma cyclodextrin, might work. Even though persons of ordinary skill in the art would not have thought it would work, the specification is fatally flawed. And this is citation 923 F3d. 1368 at page, at pin cite 1381.

And similarly, in Ariad itself, there is also an example given where just the fact that you may have a metal compound, which is analogous to the alpha cyclodextrin compound, it does not mean that the inventor is in possession of a compound with butyl or propyl, which would be the equivalent of going to higher ordered compounds like beta and gamma. These are just mere wishes for somebody to say that these might work, but there is no evidence in the specification which is where the inquiry is limited to that the inventors actually invented a complex with beta and gamma. All they did was list, here are the number of

molecular encapsulation agents as classes of compounds that they want to try. But that's just a mere wish or a plan under Ariad. That's not sufficient to say the inventors actually invented that complex with 1-MCP and anything other than alpha cyclodextrin, because that is just not present in the specification. There is no discussion, and the plaintiff has not pointed to any disclosure where there is a complex being formed with beta and gamma cyclodextrin. It is only limited to cyclodextrins can have multiple forms, and we're not disputing that cyclodextrins can have multiple forms.

THE COURT: Okay.

MR. GUPTA: Thank you, Your Honor.

THE COURT: Thank you.

So I want to talk about the remaining summary judgment motions, but I want to take a short break first.

(Short recess taken.)

- - -

(Proceedings resumed after the short recess.)

THE COURT: Okay. Please be seated.

So next I would like to talk about summary judgment number two, which seeks summary judgment that the alleged trade secrets in the '216 patent fail as a matter of law because they were not communicated to the defendants. As I understand it, the issue is whether the statute

requires communication. Is that right?

MR. IVEY: That's one of the issues I believe they raised, Your Honor. We believe that the law requires the communication element.

THE COURT: Correct. But the statute itself doesn't say that. Right?

MR. IVEY: Correct, Your Honor. That has been interpreted that way. Yes, the Court is correct.

THE COURT: Okay. Now, there is discussion in the papers about Pennsylvania versus Delaware Uniform Trade Secret Act. It seems to focus on Pennsylvania, but then there's some suggestion that Delaware is similar, it wouldn't make a difference.

So I guess my question first: Is there really a dispute over what law applies?

MR. IVEY: I don't believe there is, Your Honor, under the statutes, and the law that's being applied here is the same.

THE COURT: Plaintiff, is that right?

MR. MacGILL: I didn't hear. Mr. Ivey, you said Pennsylvania?

MR. IVEY: I believe she said Pennsylvania and Delaware. Right, Your Honor?

THE COURT: That's my understanding. I just want to make sure there's not some conflict of law issue

that needs to be addressed that no one has asked me to address.

MR. IVEY: There was no conflict of law issue raised, Your Honor.

THE COURT: So are we in agreement that we are using Pennsylvania Uniform Trade Secret act or what?

MR. MacGILL: Plaintiff agrees.

THE COURT: And you agree?

MR. IVEY: Yes, Your Honor.

THE COURT: Okay. Okay. So, Mr. Ivey, the cases that you cite when you say, you know, communication is required all reference a Third Circuit case from prior to the enactment of the Pennsylvania Uniform Trade Secret Act. And when I look at the language of the statute, it does not require the communication, it includes other criteria.

So what am I supposed to do with the language of the statute?

MR. IVEY: Your Honor, we believe that the law with regard to the Pennsylvania Uniform Trade Secret Act and the Third Circuit in other courts in Pennsylvania that have applied the law have consistently and repeatedly recited the communication requirement. We believe that's the controlling law with regard to this and we believe that's the law that was also applied with regard to this particular element under the case of Dow v. HRD Corporation, 909

F.Supp. 2d, 340, 349, 2012.

So basically, Your Honor, what happens is the Court in Dow, understanding the statutory issue and applying the law as the Third Circuit in the Pennsylvania courts have applied it and as we note in our reply brief, it has been used that way without any cases cited by the plaintiff in this case, not one single case rejecting that communication requirement. That requirement actually is dealt with and analyzed in a very closely analogous fact pattern in the Dow case. Essentially, what it takes there is the first element of this, which is whether there's a trade secret as the first element of the misappropriation analysis. And it then goes on to lay out the guidelines with regard to precisely how this works.

There must be the existence of the trade secret. We're assuming that as arguendo in this matter. And there has to be the communication element pursuant to the confidential relationship.

Under Dow, which I just referred to, Your Honor, AgroFresh has failed with respect to its claims to precisely meet these requirements because it was not the source of the trade secret communicated under the confidential relationship.

Now, the word I use here, source, Your Honor, is essentially a functional shorthand for what the Court

actually does do in this case, which is talk about the party that has possession of, in fact, the invention, the inventor of the technology, communicating to a party within that confidential relationship.

And so what the Court does in HRD, in the HRD case, Dow, it goes through the second element of misappropriation here and shows that that is what HRD in that case, which was in the same position as AgroFresh was claiming.

And the first assertion that HRD made in that case was that it had, in fact, communicated a trade secret to Dow. The Court found that that was entirely unsupported in the evidence and, in fact, it's not even argued in this particular situation.

So what we have is the close parallel, and we believe that Dow also is effective in avoiding the conflation between the breach of conflict action, which is essentially what they are complaining about with regard to Dr. Mir and what actually happened here with regard to Dr. Mir's invention and the fact that that would have been the source of the communication that he was not.

What we have here specifically is the trade secret as defined by AgroFresh is specific to the '216 patent and TruPick. The operative admission, and if we could have, Mr Lee, DI 300 at page 2 and 3, we'll show very

briefly what this is.

There is the statement here -- toward the bottom. Yes, there you go.

The first are trade secrets arising out of the development of the '216 and TruPick. AgroFresh goes on to state that these secrets were not disclosed to the defendants by AgroFresh. Rather, as AgroFresh has explained and the Decco defendants acknowledge, these technical trade secrets were developed by Mr. Mir, who then went on to breach his agreement to disclose them to AgroFresh and disclosed them to the Decco defendants instead. In other words, they are admitting here that the source was Dr. Mir and not AgroFresh itself.

This is also verified in the statements of material facts asserted in this case, No. 28, where AgroFresh specifically admits that it did not become aware of that technology, i.e., the technology in the '216 patent and TruPick until Mir, again Dr. Mir's meeting with Dr. Zettler in June of 2016. AgroFresh was not aware of TruPick until defendants issued a press release announcing it. That is statement of material fact number 28.

So what we have here is very concisely, Your Honor, a situation where the trade secret is not as required in the Dow analysis from the source communicated in a confidential relationship. And as the Court goes on to

point out in Dow at 349, it may be factually true that Dow had the obligation to keep the intellectual property developments of the joint defense agreement project confidential, and in this situation, Dow stands in the shoes of Dr. Mir. But the Court then goes on to hit the operative point. This does not alter the legal requirement that a trade secret must be communicated from the plaintiff, i.e., the source to the defendant. The source must communicate it, and that did not happen in this particular situation.

Now, material facts are not in dispute in this regard, Your Honor, because of what we've shown you with regard to the representations of DI 300. The development was by Mir. Our opening brief, DI 451, discusses this at page 14, and we have shown the quote here. And AgroFresh also admitted that it did not know about this trade secret for this invention until it was informed of that sometime later. In other words, the source is Dr. Mir.

Now --

THE COURT: But their position is that they technically owned it even though they didn't know about it because of the contract. Right?

MR. IVEY: Yes, Your Honor. That issue is also dealt with in the Dow case for the same type of reason, and that is there's no reason to and no analytical support for conflating the I.D. of the source communicating the trade

secret to another party with the issue of whether it had a duty to hold confidential and/or assign or take other action with regard to that technology.

And so as the Court in Dow points out, again, 349, it is true that Dow had a contractual obligation to keep information related to Dow's research and development a secret, but the breach of the obligation should arise to a contract claim, not a misappropriation of a trade secret claim. And because HRD had failed to show that it was the source that it had communicated anti-trade secrets to Dow, HRD's misappropriation of trade secrets fails.

We submit the analysis is the same here, and for the same reason, Your Honor, AgroFresh's argument with respect to misappropriation on this count of the summary judgment should also fail.

The cases which were cited by the plaintiff in this matter to try to avoid the on-point analysis from Dow are essentially off message because they don't deal with a source communicating the information, and in each of these instances, the plaintiff did actually serve the source and it communicated to someone. AgroFresh can't stand in those shoes because it didn't own or develop the technology. It has admitted that was done by Dr. Mir.

THE COURT: Well, it hasn't admitted that the technology wasn't owned by AgroFresh.

MR. IVEY: Correct, Your Honor. The issue of ownership, the issue of contractual obligation is not what we're disputing at this point. It's the matter of under the elements of the trade secret misappropriation law whether the secret had been communicated to another party. And the secret in the analysis here must be communicated from the source to that other party, the source being the inventor.

THE COURT: My concern about this, this motion, is when I look at the statute and the part that you say is missing and thus we can't have a claim is not in the statute. And much of the law that was developed where those elements were set forth in the Third Circuit case that they referred to, Moore, or something like that, it begins with an "M," that was before at least the Pennsylvania Uniform Trade Secret Act.

So I understand what you're saying, but no one has gone through and said, despite the fact that the law, the statute says this, there is still a requirement of a communication, because the statute certainly would allow the misappropriation to come into play. The plain language of the statute would allow for misappropriation to come into play absent a miscommunication. If there was some knowledge on the part of the person being accused, the trade secrets were misappropriated, that they were stolen, that they were

taken, something like that.

So I'm just not sure I understand how -- I understand what you are saying, that the cases say, oh, here's the four-part test, but are you aware of anything that suggests why that test, which was the test used prior to the institution of the enactment of the statute, is still -- that I should still read that test into the statute that seems to have different language?

MR. IVEY: Yes, Your Honor. Since the enactment of the statute, the cases have consistently continued to apply that same law.

THE COURT: Right. But nobody has ever -- I mean, a lot of the cases, Dow is different, because Dow does refer, at least in the case it cites to the statute, but most of the other cases in the Eastern District of Pennsylvania, the Western District of Pennsylvania, they cite to the Third Circuit case from 2003, which is before the Pennsylvania Uniform Trade Secrets Act. And I'm just wondering, did anyone actually go through the analysis and say, as a matter of statutory interpretation, this test still remains valid?

MR. IVEY: Aside from the Dow case, I don't think any Court has hit it that directly, Your Honor.

THE COURT: And even the Dow case didn't hit it that directly. All they did say was, we understand there's

a statute involved?

MR. IVEY: And that the requirement is there. So it lays out the same test the Court has acknowledged and noticed.

What we're saying here, Your Honor, is that since the enactment of the statute, the cases have continued to apply the law in the same way, and so we have more recent cases since the statute's enactment, since the earlier case the Court referred to, which continue to repeatedly recite the communication requirement with the analysis as provided by Dow, and we cited Kenset Corporation versus Ilanjian, 600 F, APPX 827, 831, Third Circuit 2015, and PharMerica Corporation v. Sturgeon. That's 218, 2018 Westlaw, 1367, 339 at *4, and there are some other citations which are also included in our reply brief, Your Honor, document 491 at pages 9 and 10.

THE COURT: So let me ask you a question. If Decco just went and broke into AgroFresh's offices and took their trade secrets documents, are you suggesting that is not actionable under the Pennsylvania Uniform Trade Secrets Act?

MR. IVEY: That might be actionable under other remedies that might be available to them, including such things as theft and breaking in and entering or so forth. It would not necessarily be what this misappropriation

statute is designed to deal with. And so what we would have in those other hypotheticals situations where there would be other remedies available to the parties. What we're launching here, Your Honor, is an effort to make sure that the elements in the misappropriation claims aren't allowed to morph into things that didn't exist from people who can't identify who had what at that time and then that turns into a misappropriation case which is thrown to the jury with no particular recourse as to how to deal with that in terms of prejudice and confusion.

What Dow does in that regard is give quick clarity with regard to the fact as to where the source is, where the information must emanate from, where it has to go, and then that there must be some use of that information for purposes that actually complete the statutory elements of misappropriation.

THE COURT: Okay. Thank you.

MR. MacGILL: Your Honor, Rob MacGill for AgroFresh for plaintiff.

Just to bring into focus the statutory realities, the Pennsylvania Uniform Trade Secret Act controls. It does not require communication. The Federal Act does not require communication as an element. We have put those authorities before the Court as you have seen.

There are a couple of other things worthy of

note. We heard a lot about 1913 decision that was incorporated into some language from some Court decisions, but that 1913 decision, of course, was decades before the enactment of these two statutes, and I don't think that 1913 decision can be imported or utilized in any way that's legally appropriate.

To be precise about the statutory requirement here, whether it's Pennsylvania law or the federal law, it bars disclosure or use of a trade secret and does not make an element of communication a part of the process.

We cited cases that have been referenced in the argument to aid earlier in response to Mr. Ivey's response that we've got Western and Eastern District of Pennsylvania decisions that make it clear that our position, disclosure and use is the point of focus.

And then as a practical matter, much like the example that you used with respect to the break-in, another example might be if communication were a requirement, whether if the Coke formula is stolen by somebody, the suggestion is that if it's stolen by somebody, it wasn't communicated, but it was taken out of a safe at Coca-Cola company, it somehow would escape the remedy of trade secret misappropriation.

These realities are clear from the statute. The statute should be the basis for the Court's determination

and the Court's ultimate jury instructions on this point. Thank you.

THE COURT: So how do you address the Kenset case that defendant just raised? The Third Circuit said it was misappropriation of trade secrets. It said, to an injunction for misappropriation of trade secrets under the Pennsylvania Uniform Trade Secrets Act, Kenset had to show, and then it lists the four things, including communication pursuant to the confidential relationship, and it cites to the statute, and that's the Third Circuit law.

So how is that not binding on me?

MR. MacGILL: I don't think -- I don't think that the clarity of the drafting in that particular opinion is instructive, especially when you have express statutory mandates and requirements that are provided.

And with respect to being sure that the parties, all parties are comfortable, a jury ultimately is properly instructed, and that a summary judgment is resolved according to the appropriate legal standard. The reference point is the statute and the reference point is what the statute says and what it doesn't say. And with respect to the -- that's true with respect to, Your Honor, to the Pennsylvania statute. It's also true with respect to the federal statute.

And how does law get written or how do words get

included? We all know as practicing lawyers, or from the bench, that sometimes there's a carry forward on precedent that may not be perfectly justified or appropriate based on subsequent legal developments. But what we have is a comfort zone here from the standpoint of the legal requirements, thereby statute, and the legal requirements that are properly analyzed are clear.

To impose, notwithstanding what the statute says in Pennsylvania, and to impose notwithstanding what the federal statute says, a new element in our view would be legally inappropriate and just simply not correct.

But we understand how some of this language has been imported in. We've read with a lot of care two things. We read the 1913 decision and we were curious for purposes of preparing for today, how did some of the words of 1913 longitudinally get incorporated in different decisions? And it did, they did. But that doesn't overwrite the statutory law and it doesn't overwrite the statutory requirements.

So for those reasons, Your Honor, we would ask that the summary judgment two be denied on the legal basis that we have identified.

THE COURT: Okay.

MR. IVEY: Very briefly, Your Honor. First, we would submit that the analysis does not stop with the 1913 case. The Dow case is from 2012 and the Kenset case that

the Court referred to was from 2015. So we're in the correct century and we're in the correct area with regard to --

THE COURT: Right. The Kenset case cites the statute as well as the 2003 case that is sort of the seminal case more that everybody seems to cite for those requirements.

MR. IVEY: Yes, Your Honor.

THE COURT: So I take your point that in 2015, it does cite the statute, but it also kind of harkens back to that earlier case that it was pre-statute.

MR. IVEY: Actually, that doesn't help AgroFresh's argument in this regard, Your Honor. The longer something stays on the books without somebody actually correcting it or criticizing it suggests that that is the way the law ought to be interpreted now. We do believe that there is the controlling effect that the Court has referred to in that regard.

Now, I also mentioned, Your Honor, going back to the fact that AgroFresh has failed to cite a single case, not one, rejecting the communication requirement that we've talked about from Kenset and from Dow.

And the Third Circuit therefore has credited the analysis that the Dow Court used. This isn't an antiquated ruling.

And with regard to other types of trade secret scenarios such as might be involved with, for example, a Coca-Cola, let's leave aside the fact we can all acknowledge that Coca-Cola's trade secret formula is recognized as the trade secret and we don't have the kind of, assuming arguendo, issues we have with regard to the kind of migration of trade secret disclosures that we've had.

The fact of the matter is when, and it has happened on occasion, very rarely, but it has happened, someone attempts to steal part of that formula, Coca-Cola essentially knows immediately what it was somebody tried to take and who tried to take it. So there isn't the problem of something being absconded with where the party that actually owns the trade secret has no way of knowing what's going on in that regard.

What we have here is a situation which is delicate, which has to do with this idea of communicating trade secrets and the trade secrets having to emanate from the source -- i.e., in this case, the inventor, Dr. Mir and not from the ownership arguments that are being made with regard to Dr. Mir vis-a-vis AgroFresh, which could very well mean that there is a cause of action here and a right to pursue action on grounds of a breach of contract action. But as the Court noted, in the Dow case, the fact that you have a contract claim does not give rise to nor support the

misappropriation of trade secrets claim, and in that regard, as was true in the Dow case, it is true here as well, AgroFresh has failed to make out the elements. It has failed to meet its burden at this summary judgment stage.

THE COURT: Okay. I'm going to take that one under consideration and go back and review the cases.

Summary judgment number three, it is similar with respect to the conversion claim and the assertion by defendants that it requires a communication.

Plaintiff, I was curious about, from the response is, were you talking here about a claim for conversion of trade secrets or a claim for conversion of something else?

MR. MacGILL: Your Honor, Rob MacGill once again.

I think with respect to conversion, the definition of what the property is is broader than what just might be a trade secret, so it's not -- what's subject to our conversion claim is broader than what would be perhaps a trade secret. So for that reason, we have to say that we're not comparing an apple to an apple in this particular context as to what is subject to conversion in terms of the property.

The second thing just to point out quickly, with respect to conversion, I don't think the Court needs to hear

from us very much about whether intangible intellectual property such as patents or trade secrets or other property is subject to a conversion remedy. It is, and we've cited quite a different, quite a series of cases on the point that property of the nature that we're talking about, intellectual property ideas, those kinds of things, are subject to a conversion remedy.

And then finally, Your Honor, with respect to defendants' own tentative authority to the Court, we would say their own authorities confirm this same basic fundamental legal point.

THE COURT: So, but I just want to make sure in the complaint. We went back and looked, and the complaint says conversion of information, and then there was some reference in the papers to conversion of confidential information or procuring information by improper means.

Are you asserting conversion of trade secrets?

MR. MacGILL: We are.

THE COURT: And as I read the cases with respect to conversion, there is an issue for a conversion of trade secrets, though perhaps not conversion of confidential information of a communication requirement.

MR. MacGILL: I'm sorry. Could you please repeat the last portion of what you said, Your Honor?

THE COURT: As I understand it from the cases

addressing conversion of trade secrets, there is a communication requirement. So is there a communication or are there factual issues about a communication of a trade secret here?

MR. MacGILL: No. And for purposes of conversion, the focus is again on unauthorized control, dominion of control, of property owned by another party. And so for that reason, Your Honor, I don't think we're back to the similar analysis that I think we've already covered with respect to the legal issue on the '216 patent trade secrets. That is, do they exercise dominion or control and make it hard for use of our property, more broadly defined in trade secrets?

THE COURT: I just want to check. Was this the Teva case? I thought it was the Teva case where the Court found that there could not be a conversion claim for trade secrets because there was no communication and there was no confidential relationship between Teva and the defendant, but there could be a claim for conversion of other confidential information.

MR. MacGILL: Yes. Going to your third point first, I think that with respect to the aspect of the decision relating to our burden of proof on conversion, we would focus on use and disclosure, but also, and that we did submit this in relation to summary judgment number two. We

showed the Court, and we'll talk about this later, the various communications of studies, biologic test results, sampling techniques. We did communicate those particular things, so whether we get to the point of making arguments to you or to the jury on conversion, we would say that this may be a legal distinction without a difference on our conversion claim.

THE COURT: You communicated them to who? Dr. Mir?

MR. MacGILL: Dr. Mir, who in turn communicated them to Dr. Oakes. So we'll talk about this in a minute, but in summary judgment two, we tried to give you exemplars, frankly, for all purposes, but on this conversion claim, we would intend to bring that evidence forward to say at the end, subject to the Court's discretions, this is all conversion and we communicated our biologic trials to him. He communicated them to Decco and UPL.

THE COURT: All right. But isn't that what happened in Teva and the Court said, with respect to the conversion of trade secrets aspect, that there was no communication pursuant to a confidential relationship because Teva and the defendant, I don't remember if it was Apotex or someone, were not in a confidential relationship. They were competitors. And isn't that what we have here, where you're saying it went through someone?

MR. MacGILL: Yes.

THE COURT: And in that case, I think it went through a former employee. But ultimately, when the Court said you can't have a conversion of trade secrets claim, it was, there was no communication pursuant to a confidential relationship because the ultimate two parties, Teva and Apotex, were not in a confidential relationship. They were competitors.

MR. MacGILL: Okay. We're speaking the same language on that case. Here's how we distinguish it. We were in a confidential relationship and we had a confidential relationship through our confidentiality agreements with Dr. Mir and his company, protected us in every particular way.

So --

THE COURT: But isn't that the same as in Teva, where it was a confidentiality, confidential relationship between Teva and the employee. The employee then went to Apotex. So the ultimate issue that the Court was looking at is, if you are going to go after Apotex for conversion of trade secrets, you can't do that because there's no confidential relationship between Teva and Apotex?

What I'm trying to understand is why isn't that -- why isn't that the situation that we have here with respect to the trade secret conversion, not with respect to

other confidential information, which apparently is different than Teva, treated differently in the Teva case?

MR. MacGILL: So we have two levels of confidential relationships here. Our company, Your Honor, and Dr. Mir, and we have our former employee, 20-year employee, Dr. Oakes, who also had a confidentiality agreement. Okay.

THE COURT: Need a confidentiality agreement between AgroFresh and the folks that you are asserting as to this claim. That's what it seems to me the Teva case is saying with respect to conversion of trade secrets.

MR. MacGILL: Right. Correct. And so, again, I can share with you how we read it in our facts. How we read it in our facts is that particular rationale, I would say, of that decision is not equitable to us because, one, we have confidential relationships of two types that I've mentioned and a third type.

The third type, Your Honor, is the UPL, the folks here in your courtroom today, promised us in connection with an acquisition they wouldn't use any information that they had in relation to the acquisition against us, and they offered $400 million for our company -- pardon me. They wanted to buy our company, so UPL signs the third confidentiality agreement and says, we promise, AgroFresh, or Dow, we will not use any of your information.

We won't hire your consultants, we won't hire your employees. We promise. Give us your stuff. Okay.

So we did. They offered $400 million for our company and we said, no, you're not even close.

THE COURT: I know. I read that.

MR. MacGILL: Okay. So back to your inquiry on this third level of analysis on this case.

So WHEN we look at Teva, we say we have three forms of confidentiality protections and we have communication, and we can prove it.

So what we would say, Your Honor, in terms of our analysis, for better or worse, is this. That piece of Teva doesn't apply to our facts because everybody, UPL, Oakes and Mir, are buttoned down by confidentiality undertaking in written contracts.

Number two, we have -- we'll talk about this in relation to the summary judgment. We have factually, in fact, communications of biologic trials by all -- all kinds of dimensions from Mir, from us to Mir first, and we'll show you that, and then we show them what to do on guest sampling. On biological trials, we tell them what to do. We have e-mails.

He then communicates to Oakes. So we have, as we get to the factual issues associated with these other trade secrets, we're talking about conversion now. What I

will say in the conversion context is, we have all of that tied up by e-mail communications in those three technical levels at least. Biological trials, gas sampling techniques, two prominent examples, and then dosing by fruit.

So, again, I hope that's responsive to your inquiry, Your Honor, but that's how we read that portion of Teva as we looked at it for purposes of the analysis that we make here today.

THE COURT: Okay.

MR. MacGILL: Thank you.

THE COURT: Mr. Ivey, what about the issue that was just raised, which is purported confidentiality between UPL and AgroFresh based on the attempt to acquire AgroFresh?

MR. IVEY: I think it's conflating issues that have nothing to do with each other, Your Honor. We could spend a lot of time arguing about what other people that he mentioned might have known or done or had in the future or the past.

THE COURT: Are any of the alleged trade secrets misappropriated, asserted to have been misappropriated by the breach of that agreement of confidentiality?

MR. IVEY: No, Your Honor, I don't believe they are. Basically, what we have here is that AgroFresh has not

met its burden of showing at the summary judgment stage the conversion of an intangible property as disclosed in the '216 patent.

We've discussed this at some length in our brief at DI 451, so I won't go back through all of that, Your Honor, but we do point out that the issue here that AgroFresh seeks recovery of the technology of the '216 patent, which is plainly in tangible property and it is not connected with physical property, and therefore it's not encompassed under the Pennsylvania conversion doctrine.

We cited two cases which are on point with regard to this, which are Apparel Business systems v. Tom James, and that's 2008, Westlaw --

THE COURT: Yes, I have that one.

MR. IVEY: All right. The other case that we cited for the Court is Vavro v. Albers. That one is 2006 Westlaw, 2547350, Western District of Pennsylvania, 2006.

And so essentially, there are numerous courts that have held similar to what we're arguing for in this particular case, and we believe that is the standard which applies.

Going to the second point that the Court focused in on, and here the Court went specifically and squarely to the issue, there is a similar requirement for misappropriation of claims in this regard, and it is stated

in our brief at 451 on page 18, and I quote. "To state a claim for conversion of trade secrets, a plaintiff must allege that, number one, it owns the trade secret and, number two," and this is the operative one that the Court was focusing in on, "the trade secret was communicated to the defendant within a confidential relationship."

And the case cited there, as the Court referred to, is the Teva Pharmaceutical case. I won't give the cite unless the Court actually needs it.

THE COURT: No. I have that.

MR. IVEY: All right. And the fact of the matter is, Your Honor, and it's undisputed here that AgroFresh never communicated the trade secret pursuant to a confidential relationship with any defendant, neither Dr. Mir nor the defendant, and that's because the technological information and trade secret was developed by Dr. Mir and not by AgroFresh.

So the communication that they're talking about pursuant to the confidential relationship is off the mark in addition to the fact we think they're wrong on the facts.

THE COURT: What about, so your motion is just going to conversion of the trade secrets, but their assertion is that it's not just trade secrets that they're arguing conversion of, but other confidential information. And as I read the Teva case, that type of claim was not

subject to the same communication. Is that right?

MR. IVEY: I believe the Court's reading on that is correct. We have the same issue we sometimes have had on a recurring basis in this case with regard to what precisely it is that they're defining as the trade secret that they're going after. Sometimes it's several generic categories. Sometimes those categories move. Sometimes they're withdrawn. Sometimes they're brought back, and sometimes we wind up talking about confidential information.

This Court was absolutely correct, that there can be all kinds of confidential information that do not constitute as a matter of law trade secrets, and so we have some issues there, but I think some of those are for a later day.

THE COURT: And they're not the subject of your motion?

MR. IVEY: They are not the subject of this motion, Your Honor, respectfully.

THE COURT: Okay. Thank you. I will take that one under advisement.

And I think that brings us to summary judgment number one, about the unsupported trade secrets, including testing protocols, biological trials, et cetera. I will hear from the defendants on that motion.

MR. IVEY: I just want to make sure I've got my

arguments lined up, Your Honor.

THE COURT: I did take it out of order.

MR. IVEY: And I didn't mean that in any way as a criticism or an observation in that regard. It was more a matter of my inadequacy, not the Court.

The issue with regard to the first summary judgment category as we brief it at document number 451 at pages 12 through 16 and in our reply brief document 491 at pages 9 through 12, is an issue of law. It's a straightforward question with regard to several categories.

The issue as a matter of law is whether there had been misappropriation under the Defend Trade Secrets Act or the Pennsylvania Uniform Trade Secrets Act, DTSP and PUTSA, and the facts in this regard, Your Honor, are not in dispute.

The trade secret as defined by AgroFresh is specific to the '216 patent in TruPick. We already showed the Court the DI 300 reference, so I won't put that up again.

But just to bring the Court back in terms of orientation on that --

THE COURT: Isn't this the one we just discussed? This is number two. I was talking about number one.

MR. IVEY: I apologize, Your Honor. I think I

may have gone back.

THE COURT: I think number one had the gas and the treatment tests.

MR. IVEY: Those are the four categories, Your Honor.

So the brief addressed DI 451, pages 4 through 12, and DI 491 at pages 1 through 8.

Now, the four categories that we have identified in this regard are the so-called testing protocol, the centralized room gas sampling and 1-MCP dosing systems, the 1-MCP application equipment, and the fourth category is various biological trials and confidential information, numerous fruits and vegetables and other things.

Now, at the outset, the summary judgment standard is also set out in a case we relied on for the second motion, which is Dow v. HRD 909 F.Supp. 2d, 340 at 346. And basically what it does is, it lays out very succinctly, and, again, the facts are closely aligned with ours, that the first element had to be the existence of a trade secret, and once you have that, we then go to the next point, and that is that to meet the element, whether there's a trade secret, there must be identification of those trade secrets with specific particularity to actually allow the Court to evaluate at the summary judgment stage that there are, in fact, trade secrets.

Here, to meet that first element as the Court in Dow pointed out, HRD standing in the position of this case of AgroFresh must show the existence of a trade secret with a reasonable degree of precision and specificity such that a reasonable jury could find that the plaintiff established each statutory element of a trade secret. That identification, the Court went on to say, must be particular enough as to separate trade secrets from matters of general knowledge in a trade or of special knowledge of persons of skill in the trade.

The identification must clearly refer to the trade secret, and as the Court pointed out there, and, again, it's appropriate that I point that out in this case as well because it's an issue that continues to hover over everything we do. This is not a discovery motion. It's a summary judgment motion and it seeks to determine whether the party in that case had sufficient facts to support its claims. And in that case, the Court found that HRD standing in the shoes of AgroFresh in this case, had the burden to establish those facts, and it could not meet those burdens on the categories that were reviewed.

Now, additionally, we in our reply, Your Honor, because it came up as part of the briefing for this particular motion, specifically addressed and alerted the Court to the resurrection of previously withdrawn

allegations regarding manufacturing, purification and measurements, and I would like to return to these if we have time briefly at the end of the argument.

THE COURT: Just so I'm clear, the manufacturing that was withdrawn, what product was that for?

MR. IVEY: That was for the TruPick and the '216 patent.

THE COURT: It was for the TruPick?

MR. IVEY: Yes, Your Honor.

THE COURT: Okay.

MR. IVEY: One more fundamental point, Your Honor. Despite their burden, we note that AgroFresh did not identify or submit an expert in this case and it did not submit with that expert an opening report on trade secrets as it is indicated under Federal Rule of Evidence 702 and Federal Rule of Civil Procedure 26(a)(2)(B).

So turning to the four categories, AgroFresh failed to meet its burden with each of these.

The first is the testing protocol I will go to, and here what we received, Your Honor, what you see in the briefing and what has been apparent during the entire course of discovery in this case is generic statements of techniques for measuring ethylene, starch and acid, and that kind of generic referencing simply fails to meet the burden of particularity.

Now, Dr. Zettler, who was referred to during these proceedings, was the Rule 30(b)(6) witness on trade secrets. He was their corporate representative. And he failed to explain how, if at all, AgroFresh met the different publicly known method for this kind of measuring of these ethylene starches and acids. And that testimony is actually cited in conjunction with our briefing papers. I believe it's Exhibit 6 at 52, lines 11 through 14.

Now, there was no clear identification with regard to the testing protocols. There was no description of these testing protocols, and there's no separation of what might have been included in these testing protocols that is a departure from, perhaps even an improvement over what was publicly known or readily available to people of skill in the art.

And in this regard, Your Honor, one of the things that we have happening, and it occurs again throughout this situation, is we sometimes move for what was supposedly a specific designation, even if somewhat nebulous, to other types of combinations of trade secrets. And we submit, Your Honor, that when, in fact, they've tried to say that there are aggregated trade secrets wherever they may be, each of those elements also still needs to be identified with the same kind of particularity with regard to why it is a trade secret, whether it's individually or

taken together with other elements in combination so that you have a trade secret.

So in this case, Your Honor, we then also didn't rest on that. We actually had the testimony of Dr. Beaudry on behalf of UPL and Decco, who analyzed what was available from the information disclosed throughout discovery by AgroFresh.

And on this particular issue with regard to testing protocols, Dr. Beaudry attached several publications of publicly known measuring techniques. That occurs at Exhibit 2 and in paragraph 84. He's very explicit with regard to all of these types of protocols.

So I won't go through all of them here, but he actually lays out in some detail that there are many known published techniques for measuring ethylene, starch and acid, and he goes on to identify what each of those are. Without giving an exhaustive list, it's certainly a very long list.

If response to that, there was silence. Dr. Beaudry's verified opinions are unrebutted in this matter, and as a result, AgroFresh's claim with regard to the testing protocols fails as a matter of law at this stage.

The second category has to do with the treatment, Your Honor. Here, Dr. Zettler was the Rule 30(b)(6) witness speaking on behalf of the company AgroFresh

for its trade secrets, and he made a fatal admission, and that was that he was not aware of any trade secrets regarding the treatment tents that had generally been described by AgroFresh in this case.

By contrast, we had Dr. Beaudry look into this and he provided a wealth of examples of use and publication from 1998 through the 2015 with regard to treatment tents, how they're developed, what they look like, what their parameters, configurations and measurements are, et cetera.

Dr. Beaulieu then came in on behalf of AgroFresh and failed to cure the admission by Dr. Zettler for his concessions because she did not address any of Dr. Beaudry's disclosures, and she did not review any of the public literature available with regard to treatment tent to actually be able to identify and articulate what was different with regard to the treatment tent in the trade secrets of AgroFresh versus what was already known publicly.

So here again we had the admission that the person who was put up by the corporation was unaware of where the trade secrets were with regard to treatment tent measured against the specific and verified opinions of Dr. Beaudry, who showed that there was no trade secret that was identified in any of the materials he reviewed on behalf of UPL and Decco, responding to what AgroFresh has generically thrown out. That testimony remains unrebutted.

We then have a third category, Your Honor, centralized room, gas sampling and 1-MCP dosing system. Here again we received only generic statements about purportedly proprietary sampling method.

Dr. Zettler conceded that the identified slide that was put in front of him during deposition did not contain any trade secrets. AgroFresh has provided no information on purported time points or algorithms for gas sampling.

Dr. Beaulieu on behalf of AgroFresh gave no specifics on timing or algorithms. Measured against this, Dr. Beaudry again analyzed what was there to be seen and would have been produced and he was able to conclude that AgroFresh has not shown any trade secrets regarding 1-MCP sampling. We discussed that further in our brief at page 8, and we also have in Dr. Beaudry's report a number of paragraphs that go through this from 160 to 164, 175 by 201.

Ultimately, his conclusion in paragraph 2 01 --

THE COURT: Dr. Beaudry is defendants' expert?

MR. IVEY: Yes, Your Honor. He's on behalf of UPL and Decco from the University -- Michigan State University. He would be very irritated if I got Ann Arbor and Michigan messed up. But Michigan State University is where he's an expert with 1-MCP, and he has been retained

and has given a report on this, which is what caused some of the reactions to our testimony in our analysis of the opinions even though there was no opening report on behalf of AgroFresh with regard to trade secrets and its technologies. And so he concluded that AgroFresh has not shown that it has any trade secrets related to gas sampling and 1-MCP and or ethylene.

THE COURT: Whether something is a trade secret is an issue of fact. You agree with me on that one. Right?

MR. IVEY: It is, provided, Your Honor, that there has been at this stage sufficient identification of that so that we can actually see that we've gone beyond generic statements, vague references, or other types of explosions of words that basically do not in any way identify precisely what we're talking about.

So with regard to gas sampling, yes, you could have trade secrets in that regard, but there has been no information regarding the time points or the algorithms. Algorithms can be produced if, in fact, they do exist and if it impacts, they are a trade secret. Had they been produced, we would have had the opportunity to see whether those algorithms were anything that people didn't already know about within the field.

So the problem at the summary judgment stage,

Your Honor, as opposed to the discovery stage is that while they may give me a general idea where they're going with their trade secrets so I can pursue that with 30(b)(6) witnesses and with their experts and their responses in the contention interrogatories, once we get to this stage, the question is, is there sufficient information to present the matter to the jury on the idea that there is a trade secret, it has been articulated with sufficient particularity that has been something we can identify and say is distinct from what would otherwise be publicly available or generally known to people in the field.

And that's the other problem when you don't actually put people to the proof with regard to the articulation of the time points or the algorithms for gas sampling, and it's simply just the idea that you are saying I've got secrets. I've got secrets and they involve methodology. They involve testing. They involve analysis. They involve algorithms. I'm not going to show you what they are or tell you what they are, but I've got them somewhere. That simply at this stage is insufficient.

And since Dr. Beaudry has gone through and could not find anything specific with regard to the centralized room gas sampling and 1-MCP dosing systems, he came to the conclusion, again, in a verified opinion and it's unrebutted, that there has been no trade secret that has

been disclosed here.

So the category, yes. The technology, yes. You could very well have trade secrets here, but at some point, this viewing point, they have to cross that threshold and tell us what is that is. Once they've told us, we can agree or disagree whether that's publicly known. You have to get over that first hurdle now. Disclose what it is with sufficient particularity that we know where we're going and what it go we're arguing about. Without that, they have failed to meet the threshold burden for supplying this information to a jury for it to make a determination beyond what we've given at this point, which brings me to the final category, Your Honor, and that has to do with biological trial. And if ever there was an explosion of this series of words without there being any specificity to it, this was the category, among others.

Dr. Beaulieu was the person who was used for the disclosure of AgroFresh's presentation and the sum and substance of what she talked about is apparently what they're claiming to be the biological trial trade secrets. Her conclusory references in this regard to trade secrets on fruits and vegetables is simply inadequate to meet the burden of clearly identifying the trade secrets. We recount the inadequacies and the lack of awareness at the opening, our opening brief at page 11, so we go through that in some

detail and we also reiterate it in our reply brief at 8. So I won't keep going through the fact that they simply didn't say anything other than we've got biological trials, but that's effectively where we wind up.

So in sum, Your Honor, what we have here is at each juncture AgroFresh's generic statements and unspecific conclusory identification of trade secrets more or less by category as opposed to specific, particularly described items, capabilities and methodologies, and algorithms is where we are at the summary judgment stage. And on each of the four categories that we brief, they have failed to show that there is a fact in dispute and that there is, in fact, information which merits going through the next step, which is to put the information before the jury. In each of these categories, AgroFresh's claims fail as a matter of law for the trade secrets.

We've cited again the Dow case because it was such a close analogy not only on the matter of the transmission of trade secrets, but also on the identification of trade secrets as well. And we believe it's controlling and let's say instructive with regard to the issues that we've raised this afternoon with the Court.

And I think I can submit on that. We do have, as I mentioned, I'm anxious to get to the other point, but I don't want to get ahead of the Court in this regard. The

Court did on August 23rd send an oral order requiring more particularity for trade secret identification, and we did, in fact, file a brief, pocket brief in response to that objecting to a number of those categories which we think are beginning to percolate back into the case and continue to create the same kind of problems we've had the entire way.

But with regard to those four categories, those were the reasons and the reason why we sought summary judgment that have not been articulated with reasonable clarity and specificity in each of those to survive the motion for summary judgment.

THE COURT: All right.

MR. WILLIAMSON: Your Honor, before we yield the podium, may I just make one point just to amplify an answer to that question you had about manufacturing and withdrawn trade secrets?

Mr Lee, if we could pull up, please, the withdrawal is at DI 300, Note 1 one, and what it says is AgroFresh has decided not to pursue claims for misappropriation of its 1-MCP manufacturing process, including purification and stabilization steps, and the manufacturing process for SmartFresh technology.

Given the way, the nature of these claims are where AgroFresh is claiming that TruPick is its manufacturing process and its product, what this basically

means is, the entire scope of manufacturing has been withdrawn, not just the TruPick product, but also expressly for the SmartFresh, which is their product, so it's the whole scope of manufacturing. As a result of this withdrawal, the parties stood down on discovery as to manufacturing across the board. We've gotten none as to any, any aspect of TruPick, SmartFresh or any manufacturing at this stage.

Thank you, Your Honor.

MR. MacGILL: So, Your Honor, coming back to, if we could, just the counts before the Court on summary judgment.

So we have summarized for the Court what remains before the Court on the summary judgment. If we may take a look at the right-hand side, trade secret number 9, which is our testing protocols, and they have challenged this in four respects.

They've challenged our application technology, our treatment tent technology and AgroFresh gas sampling technology. That's their challenge. I would like to address the evidence associated with each of these components that we've designated and give highlights of the designation so that we have clear descriptions of what has actually occurred.

These protocols are our testing protocols for a

specific point in time. These are our testing protocols for the treatment of fruit, the treatment of fruit. The separate protocol for manufacturing 1-MCP is different in time and different in context.

Manufacturing 1-MCP and -- manufacturing 1-MCP and testing for its impurities is entirely distinct from what we're talking about here.

Mr. Ivey was incorrect when he stated to the Court just a few minutes ago that, in answer to the manufacturing question, that it included SmartFresh and TruPick. Incorrect. And Mr. Williamson's clarifications also did not clarify anything.

That is what they have challenged. They have challenged the context of our gas sampling, our testing protocols in the treatment of fruit context.

Now, relative to that process, if we could go to the --

THE COURT: I'm sorry. So did you or did you not withdraw manufacturing for your product and TruPick's?

MR. MacGILL: Well, if I may, may I hand up another series of exhibits, Your Honor?

THE COURT: I just want the answer, please.

MR. MacGILL: Okay. No. What we did --

THE COURT: So what did that mean, the footnote

that Mr. Williamson just put up there, because I've got to tell you, after all the stuff with Mr. Kleinrichert where 1-MCP kind of stood for defendants' product, I, too, was thinking that that is what it meant.

MR. MacGILL: Your Honor, in the separate in time and separate in context manufacturing process of 1-MCP, what we do is we use gas chromatography, I'm stumbling on the words, to quantify 1-MCP using a Cpack Method 1. In that context, that's the first thing we do.

In that context, the second thing we do is we use the same GC to measure 1-MC impurities, and we use Cpack Method Number 2. That is what we do in the context of the manufacturing process of 1-MCP, the active ingredient. That's exactly what we talked about in the footnote, exactly.

The context we're here in court today, and we're not claiming that to be a trade secret, we're not claiming that to be a trade secret. We've said that all along consistently in the footnote, in the court here today. We are not claiming that, and they understand that.

Now --

THE COURT: But you are claiming the manufacturing process for TruPick?

MR. MacGILL: We are claiming the gas sampling technology in the context, Your Honor, that has two

components. And if I may put up one more slide, if I may show this slide.

With respect to what's in front of the Court, you can see on this slide, when we treat fruit, we have two stages -- the first 24 hours, which is represented in green. We identify issues in the atmosphere of the treatment room. In the atmosphere of the treatment room, we look for 1-MCP, ethylene, carbon dioxide, oxygen, and that has all been confirmed in the documents that we produced in the case. All right. We've told them what the method is and the equipment.

In the treatment context, that's the first 24 hours. Separately, for the next six to eight months, we have an ongoing fruit metabolism analysis where we test for hundreds of different molecules. That is entirely distinct from the manufacture of 1-MCP. This is fruit treatment and the separate process of manufacturing 1-MCP and testing for its impurities is entirely distinct from that.

THE COURT: Are you asserting the manufacturing process of TruPick? I'm not understanding what you are telling me is the answer to that question. I have your method disclosure here.

MR. MacGILL: Right.

THE COURT: It says your disclosure, and it says, your disclosure includes the manufacturing process for

NT 7815, which is TruPick.

So are you asserting that or are you not asserting that?

MR. MacGILL: We own that. Yes. We own that.

THE COURT: But how is that not withdrawn?

MR. MacGILL: We withdrew one thing, manufacturing process for 1-MCP.

Now, can we show the other example, the side-by-side example? We withdraw -- what we withdrew -- let me cull this up real quickly.

If you look at the left-hand column, what we withdrew is what's on the left-hand side, the manufacturing process, the 1-MCP manufacturing process and these specific details.

One, how we quantify 1-MCP through that method number one and how we measure impurity in the 1-MCP. That's different, that's different science. It's different technology. We withdrew that. We withdrew that in the footnote that we just, that Mr. Williamson just referenced. We withdrew that in the document 300. Specifically, we withdrew it.

The AgroFresh gas sampling is entirely distinct in time and science. Okay. What are we testing for? Scientifically, it's for the first 24 hours we're looking at a series of volatiles to make sure the dose has been applied

in the room. Okay.

Then, second, what we do for the next six to eight months through our proprietary technology is we test for hundreds of volatiles, to see what's happening inside the room after the application. And all of our science, all of our biologic trials relate to this. What happens in the treatment room?

So --

THE COURT: That's not a manufacturing process. Right? I'm getting confused because I keep asking about manufacturing process and you're going to treatment rooms.

Is manufacturing process done in the treatment room?

MR. MacGILL: No.

THE COURT: All right. So let's stop with the treatment room and stick with manufacturing process. You have withdrawn the manufacturing process for making the 1-MCP.

MR. MacGILL: Yes.

THE COURT: And SmartFresh, but you're saying you never withdrew the manufacturing process for TruPick?

MR. MacGILL: Right. We own, we own TruPick.

THE COURT: I get it. I understand.

MR. MacGILL: Okay.

THE COURT: I get it. I just want to make sure

I understand what's at issue and what's not at issue.

MR. MacGILL: Okay. If I may say it one last time, we are not, we are not -- we said it in writing. I've said it to the Court in an April hearing. I'm saying it today in open court. We are not pursuing the AgroFresh 1-MCP manufacturing process and we are not complaining with respect to that category of technology, Your Honor, a Method 1 and Method 2 with respect to that process. Withdrawn in writing, and I said the same thing to the Court in April. Okay.

Now, in my remaining time I'd like to cover three or four quick things.

THE COURT: You have four minutes, so I will give you a couple extra minutes, but go ahead.

MR. MacGILL: All right. Let's go to the statutory overview.

Your Honor, so if you look at what happens in the treatment tent in terms of how we test these volatiles in the first 24 hours and how we test these volatiles for six to eight months, that's the core of our trade secrets. That is a core of our trade secrets.

If we go to the statutory overview, please, trade secret, as this Court knows, includes lots of things, including, third line, a process.

Our testing is a process, Your Honor, and

specifically, this testing protocol is part, is a core trade secret. Let's go to the next slide.

Specifically, this testing protocol is our trade secret. We heard pieces and parts of different testimony. Here is the reality. Mr. Zettler confirmed in his deposition on December 17th, 2018: Are there other AgroFresh trade secrets related to testing protocols? I think, other than what you've, you've noted, I think collectively the combination provides the information that we say is good know-how.

Well, this was amplified by the next slide. When we told you a minute ago about process, what is the testing protocol process? How many elements does it have? Several. I'd like to talk about five.

Application technology, treatment technology -- treatment tent technology, gas sampling technology, measurement of these compounds and know-how associated with conducting tests.

We go to the next slide. This was litigated in case one. Judge Robinson said with respect to the protocols, here's what she found. She said specifically that the defendants relied on Mir to do the following: "Prepare the protocols, train/conduct the applications, evaluations, troubleshooting, et cetera." Finding of this Court previously.

Next slide. With respect to the first component of application of 1-MCP, Dr. Oakes, our former employee, now the lead on Decco, what he says, during my time at AgroFresh, it was clear that the synthesis of 1-MCP is not straightforward, and very few, if any, 1-MCP producers besides AgroFresh were able to produce truly high purity 1-MCP.

If we go to the next slide. If we go one more slide, please.

With respect to their, the steps that UPL took, they had to get into the architecture of our trade secrets through the acquisition process that they didn't succeed in, but here's what they did. They hired Dr. Oakes, and then he says a lot of things about the specific trade secrets. He admits the essential nature of our testing protocol.

Here's what he says to the head of R&D at Decco. Mr. Akhter: You just as an FYI, Nazir has an understanding of the air sampling procedure used by AgroFresh using GC/FID, and then later he says the testing seems essential.

That's exactly our point with respect. With respect to the testing protocol and the gas sampling component of it, he says he knows it and we're going to get it.

Next slide.

With respect to sampling technology, in the

context, the separate context of what we've identified, what do we do to treat fruit? Here's what Mir had. This is one of our lead people writing to Dr. Mir and others and he says the following, and he's referring to MCP sampling. I've had the parts ordered to transition an apple room gas sampling manifold to a banana pellet sampler. I need to know how much gas you would like to sample or how big your Tedlar sample bags are? He's writing this to Dr. Mir.

The device will be built to pull a sample from four different locations. You will start with the PLC. The timer will reach two hours and fill four bags from four locations, exactly the kind of trade secrets and technology that we are addressing in this lawsuit from us to him and from him to UPL/AgroFresh.

We turn the page. Our former employee, Dr. Oakes. Here's what he says about the challenges they overcome. We spent many months and years to understand how to successfully conduct trials with 1-MCP with a long learning curve to understand how to treat fruit with a gas which easily escapes. Again, context, Your Honor. Our treatment of fruit.

He continues. So as you see, 1-MCP can be a challenge unless you understand some of the basics of securing 1-MCP in an airtight tent.

Continuing, AgroFresh uses treatment tents and

plastic bottom sheet which are impermeable to 1-MCP. This film is specially made for AgroFresh.

And then notwithstanding what you just heard --

THE COURT: But that's not very specific. I mean, it's saying the film especially made for AgroFresh, so that's not disclosing a specific. Right? You need to get more specific than that for a trade secret. Right?

MR. MacGILL: Here we are. Decco now has access to AgroFresh type of tents. Okay. That's exactly what they did. And so when we get to treatment tents, this is what they look for.

Then, continuing to the next acknowledgments --

THE COURT: Were treatment tents raised in the disclosures?

MR. MacGILL: Yes, they are. And for --

THE COURT: Not the ones that I just got, the ones that defendant objected to. I got something that said treatment tents were never mentioned. I don't know if that's true or not.

MR. MacGILL: May I answer that question before continuing?

THE COURT: Yes. I don't think we need to go through all of the specifics.

MR. MacGILL: Okay. I've got it.

So let's -- two quick things. On biologic

trials, if you --

THE COURT: Yes, I've got it.

MR. MacGILL: All right. You don't need to hear from me on that. All right.

THE COURT: My issue on this is not so much that there's not an issue of fact. It's, I do have some concerns when I look at the trade secrets that are being asserted here, that as to the specificity and what is going to be put in front of the jury. So I mean, you guys, I want you to go back and talk to each other about stuff that is apparently new and wasn't in the amended disclosures that Judge Fallon allowed, because that's going to be the input.

If there's new stuff in what you submitted to me, that's not come coming in. The universe is what was in the amended disclosures that AgroFresh was permitted to make, but I can't make a determination as to what's new and what's not.

But some of the things that did catch my attention here are, you know, when you say defendants appropriated these trade secrets with respect to the '216 patent and deprived AgroFresh of the right to continue to maintain this data and other information, it's the kind of references to other information. What are you talking about? The '216, I understand you specify figures and things like that.

MR. MacGILL: Right.

THE COURT: That's fine. But some of this other stuff, it doesn't seem like it could possibly meet a particularity standard when you are talking about other information or in talking about safety information, which I'm not sure how that's a trade secret, but assuming it is. You know, any revisions and supporting information. You identify certain things, but then it's kind of this catchall, which doesn't really tell me at this very late stage of the proceedings what you're planning to do.

So my issue isn't so much with respect to the motion for summary judgment, but in looking at it, it did raise some questions about how much particularity there really is here.

MR. MacGILL: Okay.

THE COURT: So what I'd like the parties to do is to go back and discuss, because there were a number of things where, you know, for example, the defendants said in the accumulated knowledge that there were just new pages of information. If that's true, we should take those out.

There are other places where I think you probably want to be a little bit more specific and clarify that you're not just relying on random undisclosed things, but what you're going to be relying on for the trade secrets.

MR. MacGILL: Yes. And if I may comment really quickly, we understand, we will meet with them and do exactly what you said. The statements that the treatment tent information is entirely new is just false, objectively false.

THE COURT: Okay.

MR. MacGILL: All right. We will show you that.

The statements that the, you know, when you sent us that order, Your Honor, when we responded last week, we cited record evidence. This is not extemporaneous writing by the lawyers on this side of the courtroom. This is record evidence that we cited to you. Okay.

So when we look at the four corners of what we sent, Mr. Ciulla, Ms. Lindemann and I, we didn't write argument. We wrote one summary paragraph in one place. We cited evidence and interrogatories. So we will meet with them as you directed, but I feel to be hit over the head the other day, you didn't tell us this, you didn't tell us that, we did. And I could go through chapter and verse. I've got 11 citations on treatment tents ready to go. On this accumulated knowledge, same thing.

THE COURT: I'm not ruling on that at all. I'm just saying I can't tell from what's here.

MR. MacGILL: Understood.

THE COURT: And since I asked you all to do this

and they responded, I don't want to have an argument about it because you guys have not talked about it. There may be some things you look at and you say, oh, okay, that's fair, and there may be things that you point out to them, the treatment tents thing and they say, okay, we drop it.

So I would just like you guys to discuss it to the extent there are remaining issues. You can use motions in limine to address those, but that was sort of my thought in looking the trade secrets. And I just wanted to point out to you, the reason I asked for it was because when I was going through the papers, it did seem like there might be some issue with respect to some of this in particular.

MR. MacGILL: That's fair enough. We need to hand up the other -- yes. Okay. Your Honor, I made reference to some documents. Let me hand these up, too.

This is the four slides that I had made reference to, or one of the four that I made reference to (handing slides to the Court).

So, Your Honor, one last thing. I want to thank you for your time. On biologic trials, we cited a chapter and verse, so to speak, in terms of the transfer, where we told Dr. Mir about specific biologic trials, and we said to him, here they are, and we gave two examples in our briefing. We gave those trial references to him and we gave specific detailed biologic trial data and information to

him. That's in our brief, but the transfer of those trials, and then we used some University of California data trials that we have e-mails in the record, also showing we gave him our trade secrets on those biological trials as to examples.

Thank you for your time.

THE COURT: Okay. Very briefly.

MR. IVEY: Your Honor, actually, I think the display illustrated the point we were making, which is that you hear a lot of words. They're scientific words, but they're categories and they're generalities. There was no disclosure of algorithms or other trade secrets here.

With regard to combinations, there was no indication of where the trade secret combination information was, what was the secret sauce versus what was the other stuff that might have been added to it.

With regard to the treatment tents, just very briefly. One of the points we make in our papers and Dr. Beaudry makes in his disclosure is that generally, some of the airtight enclosures and the suitable treatment tents were commercially available from at least two sources at the time that's relevant here. And so the point is, yes, they may be saying they're using a specific type of treatment tent, they didn't tell us which one it is or what it was, but there were treatment tents available commercially.

Dr. Zettler never went beyond his inability to say that he didn't find any trade secrets with regard to the treatment tents and the diagrams he was shown. Dr. Beaulieu also did not add a joinder specifically with regard to what was missing in terms of specific articulation with reasonable particularity and an explanation of how that information, whatever it might be, was not already known and accessible publicly.

So we have the same situation with regard to each of those categories. There was a lot put up with regard to e-mail, what's here and there. None of that qualifies as trade secret threshold submission at this point, Your Honor, and none of it, even to the extent that it generically identified the category, explains how whatever is in there is a departure from or improvement over the trade secrets that were known, the technology that was known at the time.

So we understand the Court wants us to go back with regard to the submission and our recently noted objections, and we will do that. We respect the Court's guidance in that regard and we'll get back to the Court on that.

THE COURT: Okay. Thank you.

So one issue that I wanted to raise with the parties is with respect to trial, we do have a limited

amount of time for the trial. It will be the week of whatever week in October it is.

In order to give you a little bit more time, I am considering picking the jury the week before so that we don't waste time on that first Monday of the trial. So with respect to that, there are two things to consider, and you all can talk with your clients and then send me a joint proposal or what you each would consent to do. But my preference, and I have not spoken to any of the Magistrate Judges on this, would be that you consent to a Magistrate Judge for jury selection only and then that could take place on Friday and the Magistrate Judge would pick the jury, and then on Monday morning we'd swear them in, give them preliminary instructions and go forward.

The other alternative that we may have, though I need to discuss with the Clerk's Office, is I could do it on the Thursday, so we could pick the jury on Thursday and they could come back. It's a little bit more inconvenient for the jurors, but it may be a possibility if either of you don't consent to a Magistrate Judge or no Magistrate Judge is available.

So those are things that I'd like you to consider, and if you could get back to us by the end of the day tomorrow so that we, if we have to call in the jury early, we can do that. I think we need a couple weeks to do

that.

Any other issues that we should take up?

MR. MacGILL: Not from plaintiff, Your Honor.

MR. WILLIAMSON: Thank you, Your Honor. I hope I wrote this down in my notes correctly, but I believe that you had ordered AgroFresh to provide cases on the issue of unjust enrichment for avoided development costs of the asserted trade secrets where the defendant is not in the market, and I was wondering if that is something which the Court would permit a reply or response of a page or two if a response is warranted?

THE COURT: Yes. What I asked them to do was just to provide me cases. I believe Mr. MacGill said argument. I said just the cases. And so if I want to know -- when you submit, when plaintiff submits the cases, we will read them, and if we want argument or we want to know what the relevance is, we will ask.

MR. WILLIAMSON: Thank you, Your Honor.

THE COURT: Anything else?

MR. IVEY: Nothing further from the defendants, Your Honor.

THE COURT: Okay. Thank you.

MR. MacGILL: Thank you.

(Hearing concluded at 12:45 p.m.)

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